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Comment:
The American Coatings Association (ACA) supports the draft guidance:
Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations and suggests adopting as proposed.

Best regards,

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Comments of the American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Wood Council, National Oilseed Processors Association, Portland Cement Association, Air Permitting Forum, and Auto Industry Forum

on

Draft Guidance on
Interpretation of "Begin Actual Construction" under EPA's New Source Review Preconstruction Permitting Regulations (Mar. 25, 2020)

Submitted May 11, 2020

The American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Wood Council, National Oilseed Processors Association, Portland Cement Association, Air Permitting Forum, and Auto Industry Forum (collectively, "the Associations") are pleased to submit these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "the Agency") draft guidance document entitled *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations* (Mar. 25, 2020) ("Draft Guidance").

The Associations' members own and operate facilities throughout the United States that are subject to Clean Air Act regulation, including Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") (collectively, "NSR") preconstruction review and permitting requirements under Title I of the Act. EPA's Draft Guidance addresses an important aspect of NSR, regarding what is deemed to "begin actual construction" and thus require a permit in hand to proceed. Over time, the Agency's interpretation of this term has morphed and strayed significantly from the regulatory definition, causing confusion for permitting authorities and regulated entities alike. That inconsistency has, in turn, led to needless delays in preparations for projects that would otherwise be consistent with and permissible under the regulations.

The Associations agree with the Draft Guidance's effort to return to an appropriate application of the term "begin actual construction" based on the regulatory language. To support the guidance's conclusions and analysis, these comments offer numerous examples illustrating the importance of returning to the plain meaning interpretation, which promotes regulatory and statutory consistency, while also maintaining protection of air resources. At the same time, the Associations highlight several issues related to the "begin actual construction" interpretation that are not directly or sufficiently addressed in the Draft Guidance but merit inclusion nonetheless.

We urge EPA to prioritize issuing a final version of the guidance as soon as practicable.

I. EPA Should Proceed Expeditiously to Finalize the Guidance As It Returns to a Plain Language Interpretation of "Begin Actual Construction" as Doing So Properly Reflects the Regulation and Is Consistent with the Statutory Purpose.

As EPA explains in the Draft Guidance, the NSR regulations provide that no new major stationary source or major modification that would otherwise trigger the requirement for a major NSR permit "shall begin actual construction" without the required permit. *See, e.g.*, 40 C.F.R. § 52.21(a)(2)(iii). From the outset, when EPA originally promulgated this provision, and continuing to this day, EPA defined the term in a constrained manner – limiting the beginning of actual construction *to on-site construction activities on an emissions unit, which are of a permanent nature*. *See, e.g.*, 40 C.F.R. § 52.21(b)(11). Thus, to be prohibited in advance of permit issuance, activities must meet all of the following qualifications:

- They must be "physical" and "on-site;"
- They must be "construction activities;"
- They must be "on an emissions unit;"
- They must be "of a permanent nature."

EPA highlights throughout the Draft Guidance that as state agencies and companies embarked on implementation of the NSR regulations some four decades ago, questions arose about

many aspects of the new regulations, including the activities that could occur before permit issuance. It was in this context that EPA staff departed from these qualifications by effectively eliminating the "on an emissions unit" aspect of the definition in favor of a focus directed at the other factors, "on-site," "permanence," and "construction," and even for those elements, EPA did not consistently apply them, indeed, sometimes overreaching to preclude activities that were not even permanent.[1]

Consequences of misreading the regulations in this manner have been significant, and examples of how correcting this error will improve productivity, streamline projects at major and minor sources, and provide regulatory certainty and predictability are provided below. The interpretation reflected in the Draft Guidance is also consistent with air quality objectives of the Clean Air Act Title I permitting programs in that it will ensure permits are obtained before the units that are rightfully within the jurisdiction of the Act – the emitting units – are constructed. The Associations agree with EPA that there will be no negative emissions consequences from this guidance, in part because it merely corrects a misinterpretation of the regulations and also because permits are still required before the construction of the emitting unit.

A. The Draft Guidance's focus on the "emissions unit" in interpreting "begin actual construction" comports with the NSR regulations and serves the statutory purpose of the Clean Air Act.

Under the Clean Air Act, the construction or major modification of a major stationary source requires a permit.[2] Congress left it to EPA, guided by the statute's general dictate "to promote the public health and welfare and the productive capacity of its population,"[3] to promulgate the NSR permitting programs and to fill in the details of what constitutes construction and thus triggers the permitting requirement. When EPA promulgated the NSR regulations, it included the term "begin actual construction" to indicate the stage at which a permit becomes necessary for a project to proceed.[4] The regulatory definition provides:

> *Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.[5]

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[1] The Associations note that the release of the Draft Guidance, even without the final guidance in place, has already provided significant clarity because it lays out clearly how, historically, the interpretation of the regulations ended up departing from the plain meaning of the text, which should be presumed to reflect the original intent of the regulations.
[2] 42 U.S.C. § 7475(a) ("PSD program") and 42 U.S.C. § 7502(c)(5) ("NNSR program"); *see also* 42 U.S.C. § 7479(2)(C) ("The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.").
[3] 42 U.S.C. § 7401(b)(1).
[4] 40 C.F.R. § 52.21(a)(2)(iii).
[5] 40 C.F.R. § 52.21(b)(11) (emphases added).

The Draft Guidance is correct in recognizing that the applicability of this regulatory definition is fundamentally predicated on activities being conducted "on an emissions unit."[6] As the Draft Guidance appropriately concludes, some of EPA's earlier statements regarding the interpretation of the "begin actual construction" definition either failed to acknowledge or, even where they discussed the distinction between emissions units and stationary sources, failed to account appropriately for the requirement that construction activities be "on an emissions unit" in order to qualify under the regulations as "begin[ning] actual construction." Instead, the previous guidance documents reached beyond the regulations to insert additional considerations and limitations that lacked basis in the text.

Several of the earlier guidance documents and applicability determinations also placed an inappropriate focus on "intent" behind certain activities. For example, the 1993 Rasnic Memorandum stated (and the 1995 Seitz Letter reiterated) that "if the construction prior to such construction would not serve in accordance with its original intent except for inclusion of the emissions unit, such construction is prohibited prior to obtaining a PSD permit."[7] This consideration is entirely unsupported by the regulations and breeds inconsistency among permitting authorities by inviting them to undertake an inappropriate and entirely subjective inquiry into the project development process and internal risk and benefit analysis of regulated entities. Moreover, the purported focus on intent directly contradicts other acknowledgments within the same documents. For instance, the 1993 Howekamp Memorandum attempted to draw a distinction between "certain limited activities that do not represent an irrevocable commitment to the project" and "on-site activities of a permanent nature aimed at completing construction or of the source."[8] The 1995 Seitz Letter also stated that preparatory activities such as "entering into binding agreements or contractual obligations [are] not prohibited" and a facility that takes such steps "prior to obtaining the required PSD permit does so at its-own risk that a permit may not be issued or may not contain the terms the applicant desires."[9]

As an example, the 1993 Rasnic Memorandum concluded that construction of a retaining wall and backfilling of an excavated pit was prohibited due to its "permanent nature."[10] The purported permanence of this proposed activity should not have disposed of the issue because neither the activity of constructing a retaining wall nor filling a pit is construction on an emissions unit.

Beyond ignoring the "on an emissions unit" criterion, prior EPA guidance or determinations seemed to read into the definition entirely new criteria so as to prohibit activities based on their "cost" or that they might "significantly alter the site,"[11] regardless of whether there

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[6] Draft Guidance, at 13.

[7] Mem. from John B. Rasnic, Dir., Stationary Source Compliance, Office of Air Quality Planning & Standards ("OAQPS"), EPA to Bernard E. Turlinski, Chief, Air Enf't Branch, Region 3, "Construction Activities at Georgia Pacific," at 2 (May 13, 1993) ("1993 Rasnic Memo"); *see also* Letter from John S. Seitz Dir., OAQPS to Charles W. Williams, Comm'r, Minn. Pollution Control Agency at 2 (Dec. 13, 1995) ("1995 Seitz Letter").

[8] Mem. from Dave Howekamp, Dir., Air & Toxics Div., EPA Region 9 to Region 9 Air Agency Dirs. and New Source Review Contacts, "Preconstruction Review and Cons," at 1-2 (Nov. 4, 1993) ("1993 Howekamp Memo").

[9] 1995 Seitz Letter, at 1-2.

[10] 1993 Rasnic Memo, at 2.

[11] *Id*. at 3.

would be construction on an emissions unit. These new, extra-regulatory criteria appear to have been introduced in the 1993 Rasnic Memorandum, building on theories offered in the 1978 Reich Memorandum, that certain activities might create arguments that "activities that are very costly or would result in significant irrevocable loss to the owner" would contribute to equity arguments that would place a permitting authority "in a very difficult position when denying issuance of a permit when it results in a completed portion of a project having to remain idle."[12] As EPA notes in the Draft Guidance, whatever their merits might have been at the time, such criteria are simply not included in the regulations.

Further, the expansion of the scope of the regulatory definition in certain prior documents to prohibit not just construction activities on an emissions unit but on "any installation designed to accommodate the emissions unit," and on any "emissions unit (including any accommodating installation) [that] is an integral part of the source or modification" were similarly unsupported by the regulations.[13] The 1986 Reich Memorandum's attempt to rely on the definition of "emissions unit," which covers "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant,"[14] for support was misguided as the regulatory text clearly does not encompass parts that do not emit but merely accommodate such emitting parts.[15]

In all, these additional elements morphed the Agency's interpretation of "begin actual construction" in its various guidance documents, however well-intentioned they may have been at the time, and created inconsistency with the regulatory text without promoting air quality. Given this, it is both reasonable and appropriate for EPA to reconcile and correct the interpretation of this term.[16] EPA should include this determination, bolstered by the additional reasoning offered above, in the final guidance.[17]

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[12] *Id*. at 2 (citing Mem. from Edward E. Reich, Dir. Div. of Stationary Source Enf't, EPA to Thomas W. Devine, Chief Air Branch, Region 1, "Source Construction Prior to Issuance of PSD Permit," dated Oct. 10, 1978).

[13] Mem. from Edward E. Reich, Dir., Stationary Source Compliance Div., OAQPS, EPA to Robert R. DeSpain, Chief Air Programs Branch, Region 8, "Construction Activities Prior to Issuance of a PSD Permit with Respect to 'Begin Actual Construction,'" 2-3 (Mar. 28, 1986) ("1986 Reich Memo") (emphases added); *see also* 1995 Seitz Letter, at 2.

[14] 40 C.F.R. § 52.21(b)(7).

[15] 1986 Reich Memo, at 2-3.

[16] Although the Draft Guidance discusses the 1993 Rasnic Memorandum and its inappropriate reliance on activities of a "permanent nature" that "the source would reasonably undertake only with the intended purpose of constructing the regulated project," Draft Guidance, at 9, it appears to erroneously omit this document from the list of guidance on "begin actual construction" that EPA will no longer follow. *See id.*, at 12. The list should be corrected to include the 1993 Rasnic Memorandum in the final guidance.

[17] The Agency's prior, conflicting guidance documents cited in the Draft Guidance do not appear in EPA's guidance portal and thus, pursuant to Executive Order 13891, are appropriately rescinded. Exec. Order No. 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents* (Oct. 9, 2019), *reprinted in* 84 Fed. Reg. 55,235 (Oct. 15, 2019). To the extent that individual applicability determinations were based on faulty reasoning that is superseded by this guidance, EPA should make clear that those should not be cited or otherwise relied upon in future applicability determinations.

1. In finalizing the guidance, EPA should clarify its intent that the term "emissions unit" should not be interpreted expansively.

As EPA states, it is a prerequisite that the construction activities be conducted "on an emissions unit" to have "beg[un] actual construction." While the Associations understand that the Draft Guidance is not directed at the "emissions unit" definition itself, it is important for EPA to ensure that the problematic outcomes that ensued from the prior guidance's failure to take into account the "on an emissions unit" language are not repeated through expansive and unwarranted definitions of the emissions unit. EPA is correct that in practice an "emissions unit" may be defined by an existing permit, the project scope, or a permit application and then subsequently in the permit through terms and conditions. The focus for purposes of what actions constitute beginning actual construction of an emissions unit naturally needs to be on the emitting components of the permitted activity. We think that the inclusion in the Draft Guidance of examples of "emissions units" in the context of New Source Performance Standards ("NSPS") and National Emission Standards for Hazardous Air Pollutants ("NESHAP"), which focus on the "affected facility" or "affected source," respectively, may serve to confuse the issue because of the differences between those programs and NSR. In short, while they may be informative points of reference in some instances, they should not be viewed as dispositive as to what constitutes the emissions unit for NSR purposes.[18]

2. EPA is correct that stated concerns regarding "equity in the ground" creating pressure for issuance of permits are unfounded and actually would have the opposite effect.

The Draft Guidance acknowledges that the concerns identified in EPA's earlier guidance documents on "begin actual construction," namely that allowing facilities to undertake too much preparatory activity prior to obtaining a project permit would somehow force regulators into granting permits or particular permit terms they otherwise would not, no longer represent realistic apprehensions. In reality, even if these concerns could have been justified at the time, they certainly are not valid today. EPA's revised interpretation in the Draft Guidance is therefore reasonable in light of both the regulations, as discussed above, and the Agency's additional knowledge based on decades of implementing the NSR program.

In the various guidance documents related to "begin actual construction," EPA expressed concern that facilities could somehow "defeat" permitting requirements by making significant investments in preparations for a project and, if denied a permit or favorable permit terms, later rely on this "equity in the ground" to argue that the regulator was interfering with their investment.[19] EPA relied on this argument to constrain the activities allowed to occur prior to receipt of a permit, notwithstanding the regulatory language.

The appropriate path to taking such concerns into account would have been to propose amendments to the regulatory language and seek comment on this question. Had EPA done so,

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[18] Draft Guidance, at 20. EPA should approach comparisons with NSPS and NESHAP with caution because of the important differences between these programs. EPA can, and should, interpret the term differently in different regulatory contexts. It is thus more appropriate in the "begin actual construction" context to look to the permit application and subsequent permit terms to define emissions unit for the purposes of "begin actual construction."

[19] 1993 Rasnic Memo, at 2.

companies would have commented that such equity arguments were not based in fact and EPA would have been able to create a clear record that such reliance claims would not be heard at the permit issuance stage. As promulgated, however, the regulations do not allow for the narrowing of permissible construction activities on this basis. They concomitantly do not provide relief for a source owner that undertakes onsite non-emissions unit construction activities for which it does not ultimately receive a permit. Indeed, EPA's approach of allowing off-site construction activities, entering binding agreements or other contractual obligations, ordering materials, and undertaking temporary on-site storage (*e.g.*, storing rebar for a foundation, storing a package boiler on-site and away from its eventual, permanent location), all of which the 1995 Seitz Letter recognizes are acceptable pre-permit-issuance activities,[20] is conceptually indistinguishable from allowing on-site construction activities that EPA previously determined to be impermissible under the "begin actual construction" definition.[21]

EPA's historic allowance of these off-site activities implicates costs that in most cases are far more than the on-site non-emissions unit construction activities that are of most use to companies as they await permit issuance. Companies have always recognized the risk of committing large funds when a permit has not yet been issued and they responsibly have weighed those against the benefits of proceeding with knowledge that the permit may be denied or issued with conditions with which the company is dissatisfied. Since projects are often timed to align with opportunistic market conditions, the benefits of progressing projects to the extent feasible, even including at-risk activities, often outweigh the risks of sunk costs or inefficient project expenditure should a final issued permit affect the project design or control obligations.

As a practical matter, the very nature of the permit application process provides inherent safeguards against any significant disconnect between a facility's expectations and the eventual permit terms. Permit applications are required to consider all of the criteria that a permitting agency will evaluate in issuance of a construction permit (*e.g.*, best available control technology ("BACT"), applicable regulations, air dispersion modeling, additional impacts analysis). Even where points of disagreement arise, such as for a case-by-case technology determination, the range of potential options is well-known going into that process as the technology determinations are typically based on what other emissions units of the same type have achieved at other facilities.[22]

EPA's previously stated concern that pre-permit construction activities will unduly influence permitting decisions is not only unfounded, but as EPA notes, quite the opposite is true. Once investment is made, companies are even more motivated in working with the permitting authority to accommodate concerns and ensure permit issuance. To avoid further delays, companies motivated by market conditions, operational or maintenance concerns, and desire to

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[20] 1995 Seitz Letter, at 1-2.

[21] EPA has long recognized, and reiterates in the Draft Guidance, that construction activities and other preparations for a project undertaken prior to receiving a permit are done at the facility's own risk. Draft Guidance, at 19.

[22] While in some instances, technology transfer or a more stringent limit may be sought by the permitting authority, even there, the source is typically on notice that this could occur and is fully capable of weighing that probability in its analysis of whether to proceed with construction activities while awaiting permit issuance. Indeed, the permit application process provides numerous touchpoints (*e.g.*, requests for additional information, permit applicant meetings, draft permits, public notices) during which permitting agencies typically provide indication of differences in interpretation or their general direction on technology or modeling determinations.

realize efficiency improvements, among other factors, often make concessions on permit limits and monitoring or other requirements that they might not have otherwise accepted.

B. The revised interpretation of "begin actual construction" would have an important impact on projects ultimately subject to major NSR permitting requirements, but may also benefit projects that fall under minor NSR.

By returning to an interpretation of "begin actual construction" that is faithful to the regulatory language, the Draft Guidance would make clear that facilities can undertake necessary construction activities on-site that are not construction on the emissions unit itself. This has clear import for projects that will require a major NSR permit, but the impact of EPA's revised interpretation is not limited to major projects. Indeed, EPA's revised interpretation may also offer clarity on activities that can continue for many projects ultimately subject to minor NSR requirements, either *via* a netting permit or under a state minor NSR program.[23]

1. The Draft Guidance's regulatory interpretation would provide clarity that will remove impediments to timely progress for projects subject to major NSR permitting requirements.

As companies initiate project development, project managers create a project development schedule and identify "critical path" actions that must be initiated as soon as practicable to ensure the project remains on schedule. These critical-path items may include, for example, purchasing equipment with a long lead-time for a third party vendor to design, construct, and ship the specialized equipment. As the complexity of air permitting has evolved, and other project development processes (*e.g.*, product design, engineering, marketing, and demand response to consumer needs) have simultaneously improved to take less time, the approval of an NSR construction permit is frequently critical path in project design.

Following initial project scoping and financial approvals, the next step in a major project development schedule is typically development of a process design to identify major equipment items and establish design parameters (*e.g.*, types of equipment, design flow rates, tank sizes, pollution control equipment). Together with a project's economic analysis, that process design is then used to develop a cost estimate that may serve as the basis for a management decision to proceed with the project and commit significant resources. If approved, a project typically proceeds to detailed mechanical and engineering design and equipment definition, construction and, ultimately, project startup.

Facilities must prepare permit applications very early in the project development schedule in light of lengthy permit lead times. EPA's previous guidance has led to a series of inappropriate

[23] The Draft Guidance acknowledges that state minor NSR regulations that use the phrase "begin actual construction" or similar terminology "may apply this guidance to their minor sources at their discretion," Draft Guidance, at 1, n.1, and that those air agencies "may be able to apply this revised interpretation," Draft Guidance, at 22. While EPA's revised approach corrects the prior unreasonable interpretation of this term for major NSR purposes, state minor NSR programs utilizing this or similar language could adopt EPA's new interpretation or justify an alternative interpretation of that term for minor NSR purposes (provided it is also a reasonable interpretation of the relevant regulatory language.).

outcomes regarding what constitutes "begin[ning] actual construction" that have, in practice, prevented companies from initiating even non-emissions unit construction activities, or at least made them extremely reluctant to do so, before NSR permit issuance.[24] The inability of facilities to undertake such non-emissions unit construction activities has led to significant delays in project development schedules, particularly where delays may mean missing seasonal construction windows. These delays have necessitated preparing permit applications even earlier in the project development process, thus requiring facilities to make decisions on specifications and the like to complete air permit applications prematurely, without the benefit of some of the detailed design studies that would typically follow later in the project development process.

This artificially compressed timetable for air permitting activities highlights the importance of this guidance to provide companies the certainty needed for planning projects. Facilities need to be able to meet market demand in a timely manner, or they may lose that particular opportunity. With a global economy, market conditions require fast action for American companies to be able to compete world-wide; companies that are able to work on the non-emitting unit activities are better able to plan such that overall project schedules can be shortened, likely by several months in many instances. Right-sizing the construction schedule prevents companies from being forced to rush the design of the emissions unit to complete the permitting, which was the result of the prior policy. This rush to permit issuance frequently ended with post-issuance permit amendments due to necessary design adjustments for the emissions unit, amendments that could have been avoided if non-emitting unit activities had been allowed to proceed while the NSR permit process occurred. Thus, even though many permitting agencies are working hard to improve permit processing times, the incorrect application of the regulations regarding "begin actual construction" has been among the primary obstacles to aligning the air permitting process with reasonable project design schedules. Ultimately, allowing these activities to proceed does not actually alter anything from an emissions perspective, as indeed, the applicable technology determinations would be the same regardless of this pre-issuance activity.

EPA's revised interpretation would benefit projects across many industries. For instance, historically, pre-permit issuance activities of soil sampling, surveying, locating underground obstruction (*e.g.*, pipelines), site clearing and remediation, and bringing the site to its "original" or "undisturbed" condition were viewed as the only ones that could be accomplished. The Draft Guidance makes clear that numerous other necessary types of activities, which although not

[24] For example, a facility was cited for violating 40 C.F.R. § 52.21(i)(1) and the Clean Air Act for beginning actual construction without a PSD permit by excavating a lagoon for process water and retention ponds for its drainage system, and preparing the foundations for laying railroad tracks as well as a building by incorporating crushed stone and lime into the soil, respectively. Notice of Violation, *In re Steel Dynamics, Inc., Columbia City, Ind.*, EPA-5-01-05-IN (EPA Region 5 Feb. 15, 2001). These activities are exactly the type that should be allowed to proceed before permit issuance but have historically sometimes been included in the prohibition against "begin[ning] actual construction" due to agencies' reliance on inappropriate and overbroad interpretations of the term. In the past, EPA sometimes reached a result consistent with the revised interpretation in the Draft Guidance but nonetheless relied upon flawed premises. For example, one facility was found to have violated the Clean Air Act for installing a foundation for a reactor based on the logic that the work was "relatively permanent" and costly. *In re NOVA Chemicals Corp. d/b/a NOVA Chemicals Beaver Valley Plant*, No. CAA 03-2004-0286, 2006 EPA ALJ LEXIS 5, (EPA Mar. 8, 2006). This example demonstrates that even where EPA's revised interpretation would not change the outcome, the Draft Guidance provides much needed clarity as it tethers such results to regulatory language, rather than the improper criteria of permanence or cost.

constituting construction on an emissions unit could nonetheless have exposed a company to claims that it had inappropriately begun actual construction, would now clearly be allowed to occur before a permit is received, including: excavating the site area without backfilling it to its original condition, grading, installing non-native fill materials (*e.g.*, gravel),[25] compacting. The revised interpretation will still be consistent with the regulations because it will continue to prohibit construction activities "on emissions units" until a permit issues, *e.g.*, where a facility installs burners for a boiler or the firebox, while providing clarity that the regulations allow other non-emissions unit construction to proceed. Such permissible activities would now clearly include constructing buildings that will house emissions units where the emissions unit is not installed until permit issuance, building retaining walls, pilings, footings, and foundations (other than which are construction activities on an emissions unit), rerouting steam, electric, or related utilities (*i.e.,* where the utilities themselves are not emissions units) at the project site, and the like.

Enabling non-emissions unit construction activities to proceed can also alleviate concerns specific to a number of different geographic locations, such as short construction windows during cold weather months in northern states, construction restrictions due to extreme heat in southern states in hot months, and time-consuming soil stabilization activities required in Florida and other places.

The following examples from the Associations' member companies illustrate the range of situations in which EPA's previous "begin actual construction" interpretation added unnecessary burden and delays to project development, and how the revised interpretation in the Draft Guidance would address those scenarios.

> *Example 1*: For a project located in a northern state, a facility sought to have its permit issued in September so that it could begin construction activities on non-emissions units in September and October, prior to the ground freezing, and be able to continue construction on the emissions unit during the winter months. Due to a permit delay until December, however, all construction activities could not begin until March of the following year, after the ground had thawed sufficiently to complete the non-emitting unit work. Under EPA's revised interpretation of "begin actual construction," the additional three-month delay due to weather conditions would be avoided by allowing construction activities not on emissions units to occur prior to issuance of the delayed permit.
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> *Example 2*: A member of one Association has facilities located in northern states that contend with frozen ground and so-called "frost laws," which are local restrictions on the size of vehicles permitted to travel on county roads, during cold weather months. These frost laws impair the company's ability to deliver heavy equipment to its sites during these times, while the frozen ground prevents construction activities like excavation. EPA's revised interpretation would make clear that the company can deliver equipment to its sites (without actually installing it as part of the emissions source) and begin non-emissions unit construction activities prior to receiving its permit, in advance of the ground freezing and

[25] One facility received a notice of violation, for example, where EPA deemed it to have begun actual construction on a project where a permit had issued but was not yet effective, pending exhaustion of administrative review procedures, for undertaking activities including excavating and laying gravel. Notice of Violation, *In re ConocoPhillips Co., Roxana, Ill.*, EPA-5-08-IL-25 (EPA Region 5 Sept. 4, 2008).

frost law restrictions. This will afford companies critical flexibility to manage the combination of harsh winter weather and local restrictions more effectively.

Example 3: A cement manufacturing company frequently faces weather-related delays associated with project development, which have been exacerbated by EPA's previous "begin actual construction" interpretation. The company operates facilities in areas with heavy rainy seasons that impact the paving and setting of concrete foundations and also make it difficult to move construction equipment in and out for ground preparation activities. The heavy rains not only stop or delay construction during the rain storms, but they also frequently create unsafe muddy conditions that can delay construction for days or weeks. Some of its facilities are also located in areas with seasonal heavy winds, which lead to seasonal prohibitions on crane activities that are often necessary for construction activities. Under EPA's revised interpretation, this company can begin preparing the site and complete construction activities not on emissions units prior to permit issuance, during dry and low-wind seasons.

Example 4: Facilities located along the Gulf Coast contend with construction schedule limitations due to extreme heat in the summer months, requiring altered construction schedules to assure worker safety. For instance, facilities must account for additional rest time in construction schedules to avoid excessive heat exposure for workers. These considerations ultimately lead to construction delays, but allowing non-emissions unit construction to begin prior to permit issuance will enable facilities to better manage these seasonal timing concerns.

Example 5: Other facilities contend with seasonal impacts at manufacturing operations in geographical areas that experience heavy snowfall and/or high winds. Because interstate highways are often closed for extended periods of time, the delivery of construction materials and availability of construction contractors are frequently delayed. Construction activities are also generally more efficient during periods of non-extreme weather. Under EPA's prior guidance, having to wait until permit issuance before starting non-emissions unit construction activities has resulted in further project schedule delays for these facilities, depending on the time of year of permit issuance. The Draft Guidance clarifying that "installations necessary to accommodate" the emissions units may take place before a permit is issued, during good weather, would allow these facilities to avoid the compounding effect of permit delays on narrow seasonal windows.

Example 6: Facilities located in areas overlapping with Endangered Species Act habitat must plan construction activities around the nesting cycles of protected species. Because of this, under an overbroad interpretation of "begin actual construction," achieving timely project completion was especially challenging as the permissible time frames for projects were already narrow. The Draft Guidance would make clear the scope of activities that can be accomplished before permit issuance and thus shorten overall construction timeframes.

Example 7: Under certain soil conditions prevalent in southeastern and Gulf states, companies are often required to undertake soil stabilization efforts. Under the prior

interpretation, a manufacturing facility in one of these states was not allowed to install necessary "rigid inclusions" (*i.e.*, concrete soil stabilization pilings upon which a load stabilization platform and foundation sit) until it received its permit. This led to these critical activities, which did not involve construction on an emissions unit, occurring later in the project process and extending the overall project time. The same company now faces a similar issue in another state, which could be aided by EPA's revised interpretation if adopted by the state permitting authority.

Example 8: A paper manufacturing plant sought a PSD permit to construct a new paper machine. The construction team had mobilized equipment in place but had to wait until the permit was issued to begin non-emissions unit construction activities due to EPA's prior guidance documents. Under the Draft Guidance, these activities could have begun before receiving the permit, and it would have provided a significant benefit by reducing the idle time for mobilized construction equipment onsite.

Example 9: A manufacturing company noted that, given the extended cycles between planned outages, the revised interpretation would better enable it to complete project construction activities during regularly scheduled downtime, by allowing non-emissions unit work to proceed in advance of permit issuance. Doing so would reduce the need for additional outages and thus reduce emissions, limit worker overtime necessary to conduct work on a compressed timeline, and potentially even allow it to schedule project construction work during its off-season.

2. The Draft Guidance would also provide important clarity for projects that are not ultimately subject to major NSR permitting requirements.

In addition to projects that must obtain major NSR permits for construction, EPA's revised interpretation of "begin actual construction" will also benefit projects that, but for netting permits or synthetic minor permits, would be subject to major NSR requirements. For instance, facilities may undertake projects that do not trigger major NSR permitting requirements because of enforceable restrictions on emissions provided by a permit (*i.e.,* when a company "nets out" of major NSR). Where a permit restriction is required to avoid triggering major NSR, the concern is that EPA would take the position that beginning actual construction prior to the minor NSR permit's issuance could mean that the source triggered major NSR. For example, under EPA's prior guidance, one Association member company required a variance from its permitting authority in order to begin non-emissions unit construction activities for a tissue-dryer project at its paper manufacturing plant that was regulated under minor NSR. At the same time, other states have recognized that this should not be a concern. Regardless, this shows the confusion that existed under the prior interpretation.

The Draft Guidance thus offers valuable clarity even for projects that ultimately would not trigger major NSR permitting requirements. Clearly allowing non-emissions unit construction activities to begin for these projects before obtaining a permit will offer similar benefits as those for projects that must eventually obtain a major NSR permit to construct.

3. EPA's interpretation of "begin actual construction" for major NSR serves as a base for interpreting similar language in state minor NSR programs.

Section 110(a)(2)(C) of the Act directs states to, "… provide for … regulation of the modification and construction of any stationary source …."[26] This language provides states substantial discretion to determine the manner in which a state regulates minor source construction activities and is not bounded by Section 165(a)(2)(C)'s requirement for "a permit" before a stationary source is "constructed."[27] Nevertheless, most states require a preconstruction permit to authorize construction of a project that is not a major modification. Under Section 110(a)(2)(C), states, however, are not constrained to adopt the point in time on the "constructed" continuum that would otherwise apply in the major NSR program for purposes of implementing the state's minor NSR program.

Even with this substantial discretion available, many states have elected to mirror EPA's major source regulations with respect to the definition of "begin actual construction" and to apply that in their minor NSR rules or to use similar language. Thus, whether intended by the particular state or not, even projects that trigger minor NSR permitting may have been subject to the prior, incorrect interpretation of "begin actual construction." The Draft Guidance recognizes that such state (or local) permitting authorities "may apply this guidance to their minor sources actions at their discretion,"[28] which now would clearly allow facilities to undertake non-emissions unit construction activities before permit issuance. The Associations urge EPA to affirm that states retain this longstanding discretion to craft minor NSR programs that are appropriate for the attainment needs of the state (which may allow additional activities to occur before issuance of a minor NSR construction permit) and to make clear to states that, at a minimum, they are authorized to adopt EPA's revised "begin actual construction" interpretation for their minor NSR programs.

The Associations note that some states are already pursuing such interpretations. The Ohio Environmental Protection Agency, for instance, has expressly identified construction activities that may occur prior to obtaining a final permit-to-install (*e.g.*, installing buildings not containing air contaminant sources, site clearing and grading, excavating building footers, pilings, foundations, pads, and platforms) and "additional acceptable site preparation activities" for non-major new or modified sources (*e.g.*, installing piping and sewers up to the point of connection, installing concrete footers, foundations, pads and platforms for the building or equipment).[29] Likewise, the

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[26] 42 U.S.C. § 7410(a)(2)(C).

[27] *See, e.g.*, EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Project, Final rule*, 67 Fed. Reg. 80,186, 80,238 (Dec. 31, 2002) (acknowledging that because "[m]inor NSR programs are designed to consider the impact these increases could have on air quality, including whether local conditions justify rebutting the presumption that a listed project is environmentally beneficial[, n]othing in this rule voids or otherwise creates an exclusion from any otherwise applicable minor NSR preconstruction review requirement in any SIP that has been approved pursuant to section 110(a)(2)(C) of the Act and 40 CFR 51.160 through 51.164.").

[28] Draft Guidance, at 1, n.1.

[29] OHIO ADMIN. CODE 3745-31-33.

North Dakota Department of Environmental Quality defines "construction, installation, or establishment" such that the "placement or erection, including fabrication, demolition, or modification, of an air contaminant emissions unit" are included, but "the building that houses the source, site work, foundations, or other equipment which does not affect the amount, ambient concentration, or type of air contaminants that are emitted" are not.[30] The Idaho Department of Environmental Quality also has already interpreted its own SIP to allow construction to begin on non-emissions units, including construction to expand warehouse facilities, in the context of a project at one Association member's manufacturing facility. Activities including installation or on-site construction of manufacturing process emissions units, on the other hand, were not authorized to begin until the permit was issued. Additionally, Texas has recently taken actions to approve statutory authority and initiate development of implementing regulations that would allow for construction to begin on projects authorized by minor source permit amendments as soon as draft permits for these projects are issued. This example comports with the Draft Guidance's acknowledgment that allowing sources to proceed with construction activities prior to permit issuance at their own risk is reasonable, and illustrates a similar recognition at the state level. The current Texas Commission on Environmental Quality ("TCEQ") guidance on its website evidences some complications created by overly broad "begin actual construction" interpretations, including in EPA's prior guidance documents. For example, TCEQ currently distinguishes the types of activities that constitute the start of construction for permit units that will ultimately sit on foundations or directly on stabilized soil from those that will not require a concrete foundation.[31] This contrived distinction would be unnecessary if the "begin actual construction" criteria were interpreted consistent with the PSD regulatory criteria, as the Draft Guidance would help accomplish.

II. The Final Guidance Should Further Clarify that Foundations and Other Infrastructure that Are Not Part of an Emissions Unit Do Not "Begin Actual Construction."

While the Draft Guidance provides a significantly improved interpretation of "begin actual construction" over past guidance, it stops short of providing valuable clarity with respect to the treatment of foundations and certain other infrastructure. The Associations request that EPA consider recognizing in the final guidance that the list of example activities in the regulatory definition is not dispositive in a particular case. The definition provides a non-exclusive list of "on-site construction activities" that may "[b]egin actual construction," including "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures."[32] Consistent with EPA's revised interpretation that requires each element of

[30] N.D. ADMIN. CODE 33-15-14-01.1.2 (excluding sources subject to hazardous air pollutant emission standards with separate construction definitions).

[31] TCEQ, "Air Permits to Construct: Before You Build," (last modified Oct. 7, 2019), https://www.tceq.texas.gov/permitting/air/newsourcereview/before.html ("All work such as excavation, form erection, or steel laying pertaining to foundations upon which permit units will rest shall be considered construction. For permit units not requiring a concrete foundation, the erection or construction of associated items like earthen dams, placement of piling, soil stabilization, storage tank fills, or retaining structures shall be considered construction, and will NOT be allowed without prior receipt of the construction permit.").

[32] 40 C.F.R. § 52.21(b)(11).

the regulatory definition be met to constitute "begin actual construction," the Draft Guidance recognizes a distinction between "'installation of building supports and foundations' prior to obtaining an NSR permit where the installation in question is not on an emissions unit," which would be permissible, and on "a structure that is itself an emissions unit," which would not.[33] It likewise offers some guidance on when construction can occur prior to the NSR permit issuing for a "permanent storage structure" that is not an emissions unit, like an equipment storage building, and when it cannot where a storage structure is an emissions unit, such as may be the case for a tank containing a product or intermediary with volatile organic compounds ("VOCs").[34]

Although the examples included in the Draft Guidance are helpful, EPA should also address the range of possible types of foundations, piping, or permanent storage structures that facilities have.[35] For instance, a warehouse or other building may not have any emissions of its own but may house one or more emissions units, like a boiler, and have stacks or vents coming from the building. The boiler is the emissions unit, not the building itself. Constructing the foundation for such a building, which is not an emissions unit, should not be deemed to "begin actual construction" on an emissions unit. The same is true for other aspects of facilities, including control rooms, electrical substations, and instrumentation buildings, all of which may accommodate emissions units but are not themselves emissions units and should thus clearly be able to be constructed prior to obtaining a permit under an appropriate interpretation of "begin actual construction." The Associations believe that it is EPA's intent to allow such activities but believe that additional clarity on this point would be helpful in the final guidance document. This gap in the Draft Guidance is particularly important in light of the overly broad nature of the prior guidance documents. As noted, the 1986 Reich Memorandum expanded "emissions unit" to incorporate "any installations necessary to accommodate that unit,"[36] and the 1993 Rasnic Memorandum stated construction of a retaining wall without a permit would be prohibited.[37] Such activities should no longer properly be understood as part of an emissions unit under EPA's revised definition.[38]

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[33] Draft Guidance, at 13.

[34] *Id*.

[35] *See* Order Denying Review, *In Re Rochester Public Utilities*, PSD Appeal No. 03-03 (EAB Aug. 3, 2004) (EPA Environmental Appeals Board agreed with Minnesota Pollution Control Agency decision to approve PSD permit without requiring BACT for a project to construct a high-pressure steam line connecting its plant to another facility based on the interpretation that the piping was not part of the emissions unit.).

[36] 1986 Reich Memo, at 2.

[37] 1993 Rasnic Memo, at 2.

[38] Even in the prior guidance, there is indication that the list of examples in the definition need to be interpreted in context. For example, the 1995 Seitz Letter suggested that "EPA may be willing to discuss compliance options, consistent with the rules," should a facility request to install footings for emissions units. 1995 Seitz Letter, at 3. This language suggests that even in that letter, the EPA staff believed there was flexibility under the regulations to allow such activities that would be consistent with the regulations. This position is reconcilable by reference to the "in general" language in the definition, indicating that the list needs to be applied in the context of the particular project.

III. EPA Should Also Address Tie-Ins and Explain that They Do Not Constitute Beginning Actual Construction on a Future Emissions Unit.

The Draft Guidance contains several useful clarifications of how the regulations should be applied going forward (and should always have been applied). Indeed, the draft's reasoning provides useful clarity even now. Beyond the clarifications provided in the draft, EPA should address the treatment of so-called "tie-ins" under the "begin actual construction" definition, since it has caused confusion in the past and would also benefit from clarification. A "tie-in," in the construction context, has the function of connecting pieces of process equipment and exists in a range of industries in different forms. A tie-in typically consists of a valve and one or more blanked or capped flanges on a short piece of pipe attached to an existing emissions unit or to piping that is connected to an emission unit and is either upstream or downstream from the planned new or modified emissions unit (*e.g.*, boiler, reactor, distillation column). Practically, tie-ins are connections that allow for a future project to be "tied in" at a later date. This is accomplished by connecting the new or modified unit piping to the tie-in piping, removing the blind/cap, and opening the tie-in valve. Some tie-in equipment may be minor sources of emissions (*e.g.*, fugitives) while in other cases, the tie-in equipment has no emissions. As discussed below, the installation of the tie-in piping would normally occur during a major turnaround or other planned downtime of process equipment to safely prepare and provide flexibility for future construction, in anticipation of future expansions, or to facilitate productivity or pollution prevention projects that may be undertaken at some point in the future. These tie-ins could occur months to years before any future project that might then connect to the tie-in equipment, which would allow facilities to avoid an unnecessary and unscheduled future shutdown (and which would be evaluated at that time for potential NSR applicability).

Regardless of whether the tie-in equipment emits, permitting authorities have at times raised the question as to whether installing a tie-in (*e.g.*, piping, valve, flange) constitutes beginning actual construction of such a future project. It would therefore be helpful for EPA to clarify that tie-ins should not be considered the beginning of actual construction on future projects that would eventually be connected to the tie-in. The Associations believe that this clarification fits well within what EPA has already included in the Draft Guidance; providing this clarification would assist permitting authorities and permittees by providing clarity and regulatory certainty, while ensuring that future projects remain obligated to obtain appropriate permits before any tie-ins are connected to other emissions units and placed into service.

As EPA knows from its own experience in permitting, many complex manufacturing facilities typically operate 24 hours per day 365 days per year in steady state operation, with scheduled maintenance events every 3 to 10 years for major emissions units. In such facilities, scheduled maintenance or "turnarounds," as they are often called at refineries, are scheduled for the coordinated shutdown of major process units, many of which may be interconnected. Special air quality permit terms are often included for such events, in light of the startup and shutdown emissions associated with them. During such periods, companies conduct maintenance, repairs, and other activities that may not be possible while a unit is running in steady state mode. One such activity is the installation of tie-ins, which in some cases cannot be installed when the system is in operation for safety reasons (*e.g.*, making connections to gas collection systems). This approach improves safety because it allows the activities to be conducted when the unit is not in operation.

Installing tie-ins during scheduled maintenance provides a facility the flexibility to allow for future projects, which may be in various stages of in-house approval at a company, depending on the timing of a scheduled maintenance event and the frequency with which such events/turnarounds occur at a particular plant site. From an air emissions and safety perspective, installing tie-ins during scheduled maintenance is favored because it avoids the need to bring emissions units offline again later on and thus reduces the shutdown and startup emissions and premature metal fatigue that can shorten equipment life from repeated heating and cooling associated with such events. It also avoids the need to rebalance utility systems (*e.g.*, steam supplies, electricity demand) in connection with a shutdown and allows the continuation of steady-state operation, which is optimal for process safety.

As noted, a question that has been raised by a few permitting authorities is whether EPA would interpret the installation of a tie-in as the beginning of actual construction on a yet-to-be-permitted project that would eventually utilize the tie-in when that future unit is permitted and constructed. Such future project may itself be in an exploratory scoping phase, in some stage of financial approvals, in final design, or even pending permit issuance. Tie-ins may also be installed even where a specific future project has not been identified, simply because scheduled shutdowns may be very infrequent and the company wants to provide flexibility for future potential expansion, process improvement, or enhanced environmental performance. At the basic conceptual level, a tie-in is simply a future connection point. It may allow an existing process unit to eventually receive feedstock from, or to provide feedstock to, another process unit that is planned or hoped to be constructed or modified on-site at some future date. Once installed, the tie-in simply provides the *option* for a later project to take place and that might allow the facility to proceed more quickly and more safely with any future project once that future project obtains any required permits.

Clarifying that tie-ins can occur without triggering "begin actual construction" of the as-yet unpermitted (and potentially not even contemplated) future emissions unit is entirely consistent with EPA's interpretation in the Draft Guidance, which appropriately focuses on construction activities on the emissions unit, rather than the entire stationary source. It would be inappropriate to treat something like a tie-in as beginning actual construction because it is akin to an "'installation necessary to accommodate' the emissions unit at issue," which EPA notes in the Draft Guidance, "is *not* considered part of the emissions unit."[39] Thus, if a facility may construct an installation or structure that is not part of the emissions unit for which the facility seeks a permit to construct or modify without being deemed to "begin actual construction," constructing or installing a tie-in, which is not part of the emissions unit, should also be permissible.

Tie-ins are also properly considered as separate from the future project that may or may not eventually occur.[40] A facility decision to implement a tie-in separately from future projects is a clear indication of its willingness to expend costs necessary to install the tie-ins without certainty that a future project will be funded, permitted, and installed, in large part due to the well-recognized safety and environmental benefit of installing tie-ins when units are otherwise shut down for periodic maintenance or other purposes. Prohibiting tie-ins from being installed until a

[39] Draft Guidance, at 12 (emphasis in original).

[40] That a tie-in exists does not mean a future project that would tie in has begun construction because the future project may never actually go forward. If anything, a tie-in might be considered its own project, and companies would take into account the emissions from the tie-in during a NSR applicability analysis.

permit is received for a future project because the tie-in might someday be connected to a future emission unit that could require a major NSR permit would be an unreasonable interpretation of EPA's regulations. Further, because tie-ins occur on existing process units, it is appropriate to view them as their own project. Indeed, tie-ins often require their own minor NSR permit in some states and are not treated as beginning actual construction of some future project for which permitting or even planning is not yet complete.[41] Indeed, many states already have standard exemptions, registrations, or permits-by-rule applicable for valve/piping installations, *i.e.*, the very types of equipment that make up tie-ins.

Making clear in the final guidance that installing tie-ins does not constitute beginning actual construction of a future project would provide a significant benefit to facilities and to air quality because it would avoid needless shutdowns of equipment (that can shorten equipment life, increase emissions and require additional safety precautions), improve clarity of regulatory interpretation, and result in more efficient project execution and timely provision of useful products. As discussed above, for sources with continuing operations or planned unit shutdowns for major maintenance activities (*e.g.*, relining a reactor or upgrading trays in a distillation column), the clarification on treatment of tie-ins will allow tie-ins to be installed during these infrequent opportunities. If a facility contemplates some potential expansion or rerouting project within the next several years, it is extremely advantageous to be able to install a tie-in during the next scheduled outage so that, should the facility actually determine it will pursue a project, the equipment need not be taken offline again merely to allow for installation of the connection valve or pipe at that point. Using pre-scheduled outages to install tie-ins not only avoids costs due to lost production time and shortened equipment life due to premature metal fatigue from repeated heating and cooling, but can also avoid unnecessary emissions increases associated with bringing the equipment offline another time just to install a tie-in, since startup and shutdown events can involve different emissions profiles than occur during normal operations. The projects that benefit from tie-ins include safety improvements, environmental control upgrades, or economically beneficial projects such as capacity increases and energy/process efficiency improvement. Clarifying treatment of tie-ins allows these project benefits to be realized more quickly.

Addressing tie-ins in any final guidance will improve consistency of interpretation across states and give permitting authorities a clear indication of the flexibility they have to allow these activities under the current regulations, without requiring special exemptions or further clarification from EPA. Indeed, many permitting authorities already interpret "begin actual construction" appropriately for tie-ins.[42] For example, one Association's member company was able to obtain an exemption to install a tie-in during a scheduled outage at a Florida facility in advance of obtaining the permit for the eventual planned project. Similarly, another Association member company obtained a determination from its permitting authority to install tie-ins for new gas collection piping when its mills were shut down for scheduled maintenance, provided that the

[41] If a tie-in project results in emissions, the emissions from the tie-in project would be analyzed (to the extent it is a physical or operational change).

[42] For example, the South Coast Air Quality Management District issued a determination finding that installation of root-valve tie-ins on pipelines within an existing process unit at a refinery was not prohibited under the "begin actual construction" definition. Letter from Mohsen Nazemi, P.E., Assistant Deputy Exec. Officer, Eng'g & Compliance, South Coast Air Quality Mgmt. Dist. to Gerardo Rios, Acting Chief of the Permits Office, Air Div., EPA, Region 9 (June 5, 2001).

new lines were valved and capped and not put into service until the project permit was issued. This was important because tie-ins could not be installed during ongoing operations, since cutting into the pulping off-gas collection piping systems while the mills are running would not be consistent with safety requirements for the facility, and waiting to install lines until the next scheduled downtime was to occur would create significant delays because the facilities are only shut down every 18 months or so. Because of the inconsistencies in approach across states based at least in part on their interactions with the relevant EPA regional offices, other Association members have been unable to obtain concurrence for similar activities. For example, one member received a notice of violation for installing a fuel entry gate at a cement kiln in a Midwest state during a planned annual outage, despite the fact that the gate was welded shut and was not going to be placed into service until after a project permit was obtained. These examples illustrate the benefit of EPA making clear in the final guidance that tie-ins are permissible and do not constitute "begin[ning] actual construction."

IV. EPA's "Begin Actual Construction Interpretation" Is At Least Environmentally Neutral and Provides Additional Emissions Reduction Benefits.

The Draft Guidance states that the revised interpretation of "begin actual construction" will have no emissions consequences or adverse environmental effect.[43] This is both reasonable and factually correct. First, EPA's prior interpretation was not a reasonable one given the regulatory text. Thus, because any emissions increase would be based on a comparison to an unlawful interpretation, the emissions impact would not be cognizable. Second, as EPA notes, in order for the emissions unit to actually be constructed and begin emitting, the project permit must still be issued. Additionally, the Draft Guidance would have no effect on the NSR permitting requirements to conduct BACT or lowest achievable emission rate evaluations. Because conducting preconstruction activities, which are done at the facility's own risk as to whether the permit will be issued, does not make it more or less likely that the permit will be granted, revising the "began actual construction" interpretation will not result in increased emissions.[44]

The Draft Guidance should be expected to lead to decreased emissions in some cases, by allowing earlier implementation of projects that reduce emissions either on- or off-site, such as projects to reduce electrical consumption or switching to alternate fuels. One Association member has indicated that EPA's revised interpretation could allow projects that will result in an emissions decrease, such as replacing an old, higher-emitting burner in a boiler with a low Nitrogen Oxides ("NOx") burner, to proceed more quickly by allowing construction on the related "installation necessary to accommodate" the emissions unit prior to issuance of the PSD netting permit.

[43] Draft Guidance, at 14.

[44] Additionally, to the extent that non-emissions unit construction activities undertaken prior to receipt of a permit consistent with the Draft Guidance may create some emissions associated with construction work that does not reflect an increase because they would have occurred after permit issuance anyway, and may otherwise be limited under relevant emissions standards in other Clean Air Act programs (*i.e.*, SIP-specified indirect review programs under Section 110(a)(5)(A)(1) or federal off-road mobile source standards).

Additionally, as noted above, the clarification that tie-ins do not constitute "begin[ning] actual construction" could reduce emissions by capitalizing on shutdowns that would already occur and not creating new shutdown and startup emissions.[45]

V. Conclusion

The Draft Guidance should be finalized quickly as it is an important NSR reform and corrects inappropriate interpretations of the regulations that have occurred over time. Please contact Shannon S. Broome (SBroome@HuntonAK.com) or Alexandra Hamilton (AHamilton@HuntonAK.com) with any questions regarding these comments.

[45] Emissions reductions could also result from minor NSR projects, many of which require emissions reductions to remain subject to minor NSR, which could proceed with non-emissions unit construction activities more quickly in states that opt to adopt EPA's revised interpretation into their minor NSR programs.

Office of the Attorney General
State of West Virginia

Patrick Morrisey
Attorney General

May 11, 2020

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C., 20460

Submitted Electronically via E-mail

Re: Comments of the States of West Virginia, Kansas, Alabama, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, and Texas, on the Proposed Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations.

Dear Administrator Wheeler:

The undersigned States appreciate the opportunity to comment on the proposed guidance from the Environmental Protection Agency ("EPA"), which would change EPA's interpretation of when preconstruction permitting requirements are triggered under the Clean Air Act ("Proposed Interpretation"). As described further below, the undersigned States strongly support the significant efforts that the Proposed Interpretation represents to remedy significant and burdensome "mission creep" in the EPA's current implementation of the New Source Review ("NSR") permitting system. This interpretation has obstructed and delayed vital infrastructure projects in our manufacturing and energy sectors. Especially given the looming need to re-open and revitalize America's economy in the wake of COVID-19—for domestic manufacturing and power generation specifically—the Proposed Interpretation represents a timely step in the right direction.

BACKGROUND

In 1977, Congress amended the Clean Air Act to impose a new permitting system on construction projects: "New Source Review." Clean Air Act Amendments of 1977, Pub. L. No 95-95, §§ 127, 129, 91 Stat. 685, 731-42, 745-51 (codified as amended at 42 U.S.C. §§ 7470-7479, 7501-7508). New Source Review encompasses two permitting programs that govern the construction of new stationary sources of air pollution, depending on where the source is located. In regions where National Ambient Air Quality Standards have not been met, projects must obtain a "Nonattainment New Source Review" ("NNSR") permit. 42 U.S.C. §§ 7501-15. In regions where air quality standards have been met, projects must obtain a "Prevention of Significant Deterioration" ("PSD") permit. 42 U.S.C. §§ 7470-92. Although there are differences between NNSR and PSD permitting, both forms of NSR permitting have largely similar scopes. *See*, *e.g.*, *Environmental Defense v. Duke Energy Corp*., 549 U.S. 561, 568-570 (2007) (describing narrow distinctions between PSD and NNSR terminology).

Getting an NSR permit requires significant capital expense, but even applying for a permit is an expensive and complicated process. To obtain a permit under the PSD program, "the applicant must make available a detailed scientific analysis of the source's potential pollution-related impacts, demonstrate that the source will not contribute to the violation of any applicable pollution standard, and identify and use the 'best available control technology' for each regulated pollutant it emits." *Utility Air Regulatory Group v. EPA* ("*UARG*"), 134 S. Ct. 2427, 2443 (2014) (citing 42 U.S.C. § 7475(a)(3), (4), (6), (e)). For example, EPA has acknowledged "that PSD review is a 'complicated, resource-intensive, time-consuming, and sometimes contentious process' suitable for 'hundreds of larger sources,' not 'tens of thousands of smaller sources.'" *Id.* (quoting 74 Fed. Reg. 55304, 55321–55322). Similarly, under NNSR permitting, an applicant must show that the project will comply with "the most stringent emission limitation" imposed by States or "achieved in practice" for sources in that category. 42 U.S.C. §§ 7501(3), 7503(a)(2). Although this is a slightly less stringent standard, the process imposes similar costs and uncertainties. *See* Proposed Interpretation at pp. 1-2 n.2 ("EPA interprets the preconstruction review requirements in [NNSR] regulations consistent with the requirements [for PSD permits].").

Given the costs and delays associated with obtaining an NSR permit, there are significant consequences to determining which precise time permitting requirements spring into effect. These programs apply to the construction of nearly any industrial facility, including power plants and steel mills. They also apply whenever a covered facility undergoes "modification," which can mean "any physical change . . . that increases emissions" of air pollutants. 42 U.S.C. § 7411(a)(4). In both systems, "modification" is defined as "any physical change in, or change in the operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §§ 7472(2)(C), 7501(4) (both referencing 42 U.S.C. § 7411(a)).

Over the years EPA's regulations have limited the scope of NSR permitting to help prevent the program from capturing every improvement to an emissions source. For example, EPA has long maintained that performing "maintenance, repair, and replacement" does not constitute a "physical change"—and thus does not trigger new source review—if the activity is "routine." 40

C.F.R §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). The Administrator determines whether the "routine maintenance" exemption applies on a "case-by-case" basis. *Wisconsin Elec. Power Co. v. Reilly* ("*WEPCO*"), 893 F.2d 901, 910 (7th Cir. 1990); *see also United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 856 (S.D. Ohio 2003). The exact scope of this exemption requires additional clarification,[1] but it remains a helpful guidepost for identifying activities that do not require an NSR permit. Similarly, a permit is not required until an owner or operator "begin[s] actual construction" on the source in question. 40 C.F.R. § 52.21(a)(2)(iii). And critically, the regulations define "begin[ning] actual construction" as "initiation of physical on-site construction activities *on an emissions unit*," i.e. the "part of a stationary source that emits or would have the potential to emit" pollutants. 40 C.F.R. § 52.21(b)(7), (11) (emphasis added). Thus, a source owner or operator does not "begin actual construction" for purposes of NSR permitting with every construction project at a regulated source. Only projects that involve those parts of the source directly responsible for regulated emissions activate the NSR permitting apparatus.

Unfortunately, EPA has adopted a broad construction of the term "begin actual construction"—and consequently changed both the scope and the timing of NSR permitting. For example, a letter from EPA to a state enforcement agency stated that an NSR permit is needed before any construction activities "intended to accommodate" an emissions unit can take place. Letter from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards, to Charles W. Williams, Commissioner, Minnesota Pollution Control Agency (December 13, 1995) ("Seitz Letter") at 2. This interpretation effectively expanded the requirement beyond construction activities "*on* an emissions unit" to encompass construction *related to* an emissions unit. 40 C.F.R. § 52.21(b)(11) (emphasis added). Similarly, EPA has concluded that building a retaining wall intended to aid construction of a power plant is sufficient to trigger NSR permitting, even though the retaining wall was never intended to be part of the regulated emissions source. Memorandum, John B. Rasnic, Director, EPA Stationary Source Compliance, Office of Air Quality Planning and Standards, to Bernard E. Turlinski, Chief, Air Enforcement Branch, EPA Region III (May 13, 1993) ("Rasnic Memorandum") at 2, *available at* https://www.epa.gov/sites/production/files/2015-07/documents/cnstrctn.pdf.

The problem with this broad interpretation is not that it makes projects subject to NSR permitting in general; constructing or overhauling a power plant generating unit will eventually involve modifying the emissions unit, and that portion of the project is indisputably within the scope of the NSR program. Rather, the problem arises from the portions of the project that this interpretation captures, and the project delays that follow from that. Applying the regulations as they are written would allow a source owner to complete preparatory projects—such as constructing retaining walls—while simultaneously seeking an NSR permit for the eventual modifications to the actual emissions unit. Applying the regulations as EPA has read them in the past, however, prohibits any such work until the NSR process is complete. The application process is never a *fait accompli*, so source owners certainly risk wasting money on construction costs by doing preparatory work while their permit application is pending. But given the length of time

[1] At least one of the undersigned States has requested clarification on this issue. That petition was filed in April of 2018 and remains pending. *See* State of West Virginia, *Petition for Rulemaking to Protect Domestic Integrated Iron and Steel Production* (2018), *available at* https://ago.wv.gov/Documents/Metal%20Coal%20Petition.PDF.

associated with NSR permitting review, those risks and costs may be preferable to the risks and costs associated with delay.

A more recent example in Kansas highlights how lost time can lead to a lost project. In February 2006, Sunflower Electric Power Corporation ("Sunflower") filed an application with the State for a permit authorizing three new 700 MW coal-fired EGUs (with ancillary facilities and equipment) at its Holcomb, Kansas Station. Sunflower later modified its application to eliminate one of the proposed EGUs. In October 2007, under pressure from environmental groups, the KDHE Secretary denied Sunflower a permit that would have allowed construction to begin. Sunflower and other parties challenged the denial, and in 2009 the State of Kansas relented by agreeing to renew the permit process if Sunflower would *further* reduce the scope of the expansion project to a single 895 MW unit. The settlement agreement was ratified by the Kansas Legislature and signed into law by then-Governor Mark Parkinson.

Yet even this partial victory after a two year process was not enough to salvage the project. In 2010 a new, final permit was issued by the State, only to face a legal challenge from the Sierra Club. The Sierra Club's challenge ultimately involved two trips to the Kansas Supreme Court, which lasted another seven years: The Court did not give final approval for the project until March 2017. *See Sierra Club v. Mosier*, 391 P.3d 667 (Kan. 2017). By that time, however, project costs had increased substantially and Sunflower's expansion partner eventually pulled out of the project. The project was finally abandoned in January 2020 and the permit was allowed to expire.

This example is not isolated. Ultimately, every project modifying a source of emissions will likely face similar delays and expensive roadblocks. From steel mills and auto plants looking to increase efficiency to electrical generators seeking cleaner sources of power, almost all modification projects require substantial pre-construction work that does not directly alter the emissions source itself. Thus, by forbidding any such work from taking place until the NSR process is complete, EPA's current interpretation of "begin actual construction" hamstrings expansion and improvement projects in America's manufacturing and energy sectors.

DISCUSSION

The Proposed Interpretation rescinds the overbroad elements of the current interpretation and ensures that every word of the regulatory text carries meaning. The NSR regulations require only permitting for construction activities that affect an "emissions source," or the "part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant." 40 C.F.R. § 52.21(i)(1), (b)(7). It logically follows that construction activities that relate to *other* parts of a stationary source—parts that do not have the potential to emit any NSR pollutant—do not constitute "actual construction," and thus do not invoke the permitting process. The Proposed Interpretation reaches this same conclusion. Proposed Interpretation at pp. 12-13, 15. The undersigned States support this common-sense result.

The undersigned States write not only to support the Proposed Interpretation's textual analysis, but to emphasize that the current interpretation was based on a flawed view of the federalism balance struck the Clean Air Act strikes. While EPA is responsible for setting the

substantive standards of performance for new and modified sources, enforcement of these standards falls largely to the States. *See* 42 U.S.C. §§ 7477 ("a State may[] take such measures . . . as necessary to present the construction or modification of a major emitting facility which does not conform to the requirements of [PSD permitting]"); 7502(b)-(c) (setting forth requirements for States to submit plans for implementing NNSR permitting). And indeed, "[m]ost NSR permits are issued by state or local air pollution control agencies." EPA, "New Source Review (NSR) Permitting" (Jan. 19, 2017), *available at* https://19january2017snapshot.epa.gov/nsr/learn-about-new-source-review.html.

The current interpretation of the "begin actual construction" threshold was adopted in order to shift decision-making authority away from the States, and reflects a misplaced sense of paternalism with no basis in the statute. EPA had previously expressed concern with permitting authorities being "placed in a very difficult position" by source owners and operators seeking NSR construction permits after making significant expenditures for preconstruction work on non-emissions source portions of a regulated facility. Proposed Interpretation at 18 n.31 (citing Rasnic Memorandum at 2). EPA believed this concern was severe enough to warrant adopting its expansive interpretation of the NSR permitting requirement: As its theory went, state and local authorities could not be trusted to make fair NSR permitting decisions if faced with pressure from an applicant with substantial "equity in the ground." *Id*. Thus, EPA decided simply to require a permit from the outset, before any construction on the portions of a source that the Clean Air Act actually regulates.

This approach upsets the Clean Air Act's cooperative federalism premise, showing an unfortunate and unwarranted lack of faith in state and local permitting authorities. The Clean Air Act does not give EPA power to micromanage the States' implementation of the NSR program or otherwise seek to limit States' review. EPA has a role early in the process, and can approve or reject a State's proposed implementation plan if it is "inadequate." 42 U.S.C. § 7502(d); *see also* 42 U.S.C. § 7477 (construction may only take place if subject to a PSD permitting system that "meets the requirements" of the Act). And insofar as EPA may issue "guidance" to States, 42 U.S.C. § 7502(d), that guidance's purpose is to facilitate submission of valid implementation plans. In short, EPA can help States address difficult permitting questions, but rewriting the applicable regulations in order to prevent States from being presented with difficult questions at all swerves too far from the statute's goals.

The appropriate response to "equity in the ground" arguments is that of the Proposed Interpretation: clarifying that sunk costs may not be considered once permitting requirements are actually triggered, and trusting States to recognize when that is the case. States are entitled to at least that much respect. The Clean Air Act demands no less, recognizing that the States bear primary responsibility for safeguarding the natural resources within their borders. The current interpretation's approach divests States of this responsibility. And in doing so, the current interpretation delays *all* projects that are subject to NSR permitting. Even if it were necessary or proper for EPA to intercept difficult questions before they reach state permitting authorities—and it is not—the current interpretation would still be a decidedly poor bargain. EPA should trust state and local permitting authorities to make the right decisions in edge cases, rather than slow down infrastructure development across entire sectors of the economy.

* * *

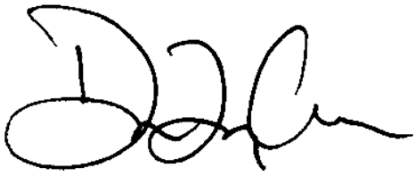
We appreciate the opportunity to comment in this important proceeding. The Proposed Interpretation will repudiate the worst-of-both-worlds approach from the current NSR regime, which restricts States' prerogatives at the cost of delaying economic development. Fostering economic development is as crucial now as it has ever been, particularly as the nation strives for more independence in manufacturing and energy. We respect the EPA's commitment to ensuring that it fulfills its mandate in a way that is faithful to the regulatory text and principles of federalism, and look forward to the EPA's continued attention to the issues raised in these comments as it further evaluates, and ultimately finalizes, the Proposed Interpretation.

Sincerely,

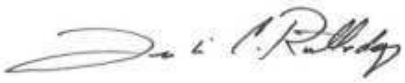
Patrick Morrisey
West Virginia Attorney General

Derek Schmidt
Kansas Attorney General

Steve Marshall
Alabama Attorney General



Daniel Cameron
Kentucky Attorney General



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Department of Environmental Conservation

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April 17, 2020

Environmental Protection Agency
Submittal via draft_permitting_guidance@epa.gov

Subject: Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Dear Docket Manager:

The Alaska Department of Environmental Conservation (ADEC) Division of Air Quality has reviewed EPA's draft interpretation of the regulatory definition of "Begin Actual Construction" under the new source review preconstruction permitting regulations. ADEC appreciates the opportunity to provide input on this important matter and offers the following comments on the proposal.

ADEC supports EPA's overall proposal to update the interpretation of the regulatory definition of the term "begin actual construction" in 40 CFR 52.21(b)(11) to allow source owners/operators to engage in a broader range of preparatory activities they might desire to undertake for the purpose of ensuring projects are positioned to move forward in an expedient manner, prior to obtaining a New Source Review (NSR) permit.

Under EPA's revised interpretation, a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction on an emissions unit, as the term is defined in 40 CFR 52.21(b)(7). Further, under this revised interpretation, an "installation necessary to accommodate" the emissions unit at issue is not considered part of that emissions unit, and those construction activities that may involve such "accommodating installations" may be undertaken in advance of the source owner or operator obtaining a major NSR permit.

ADEC agrees that, given the remote areas and extreme conditions encountered in Alaska, preparatory work of a proposed project site in Alaska often occur at a staged schedule and often seasonally over multiple years. ADEC also agrees that those activities should not constitute physical construction on an 'emissions unit', as the term is defined in 40 CFR 52.21(b)(7).

ADEC urges EPA to emphasize in the guidance that prospective source owners or operators who choose to undertake on-site construction activities prior to obtaining an NSR permit, do so **at their own risk** (emphasis added) and that a source cannot use the equity and resources expended to claim cost infeasibility or otherwise

influence the Best Available Control Technology (BACT) determinations or the decision to grant or deny a permit.

ADEC also recommends that EPA clearly identify what constitutes physical construction on an 'emissions unit' to be used under the revised interpretation, to ensure that the regulatory definition is not overextended beyond its intended meaning. This is important to ensure that agency staff have the clear ability to identify when a source begins actual construction for permit related work, as well as for compliance and enforcement purposes.

ADEC appreciates EPA's review and consideration of the provided comments. If you have any questions or require any additional information, please feel free to contact me by phone at 907-465-5561 or by email at jim.plosay@alaska.gov.

Sincerely,

James R. Plosay, Manager
Air Permits Program

cc: Jason Brune, ADEC/Commissioner
Alice Edwards, ADEC/Director
Aaron Simpson, ADEC/Air Permits
Patrick Dunn, ADEC/Air Permits
Jason Olds, ADEC/Compliance

Submitted electronically

May 11, 2020

New Source Review Group
Mail Drop C504-03
U.S. Environmental Protection Agency
Research Triangle Park, North Carolina 27711

Re: Comments on the United States Environmental Protection Agency Changed Interpretation of "Begin Actual Construction"

To Whom It May Concern:

The California Air Resources Board (CARB) is providing comments on the United States Environmental Protection Agency (EPA) draft guidance document released in March 2020, titled *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*. In that draft guidance, EPA is purporting to propose a new interpretation of "begin actual construction" in EPA's regulations. This new "interpretation" is being proposed illegally, and would significantly undermine permitting programs designed to protect public health by creating incentives to build sources without proper permits.

For 40 years, EPA's New Source Review (NSR) preconstruction permitting regulations have provided that any new major stationary source or major modification at an existing source can begin actual construction only after receiving an NSR permit.[1] EPA's regulations define "begin actual construction" to mean permanent "physical on-site construction activities on an emissions unit," including "building supports and foundations."[2] Now, EPA is proposing to substantially taper its "interpretation" to allow pre-permit construction on any installations or structures except a discrete emissions unit[3]—which conflicts with the plain text of its regulations. In other words, EPA is proposing to alter its regulatory language without proceeding through notice-and-comment rulemaking.

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[1] 40 C.F.R. § 52.21(a)(2)(iii) ("No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements."); *see also* 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11). As in EPA's draft guidance, any following citations to 40 C.F.R. § 52.21 also include its counterparts in sections 51.165 and 51.166.
[2] 40 C.F.R. § 52.21(b)(11).
[3] Memorandum from Anne L. Idsal, Deputy Assistant Administrator, U.S. Environmental Protection Agency, to Regional Air Division Directors (Mar. 25, 2020), at 2–3.

Under the proposed pre-permit construction approach, permit applicants could substantially invest in a new facility before a permit has been issued. The draft guidance thus conflicts with the Clean Air Act. The draft guidance also provides no justification for abandoning previous concerns with respect to "equity in the ground" that put pressure on permitting agencies to issue permits even if it is not proper to do so or waste funds if permits are not issued; if finalized, the draft guidance thus would invite greater burdens and uncertainty into the NSR permitting process. This draft guidance should be withdrawn.

EPA's Proposed New "Interpretation" is Precluded by the Regulatory Definition of "Begin Actual Construction" and Requires Notice-and-Comment Rulemaking.

The point of the NSR program is to ensure that sources are built only after they are properly reviewed and permitted to require appropriate emissions control technologies. To that end, the NSR Program is sweeping, and critically relies on barring an applicant from beginning any permanent construction of a new major facility before receiving a permit. As discussed below, this sensible approach preserves the status quo while the permitting authority conducts its review. EPA's proposed new reading upends this process and is contrary to law.

EPA's NSR regulations provide:

> Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.[4]

After 40 years, EPA is now proposing to interpret this regulation implausibly and narrowly to focus only on the specific construction of an "emissions unit" while allowing virtually anything else to be built without a permit. However, the regulation flatly bars such an interpretation. As EPA notes in its draft guidance, the second sentence of the regulation "provides a non-exclusive list of examples of '[s]uch activities'"—i.e., "physical on-site construction activities on an emissions unit which are of a permanent nature."[5] In other words, EPA, through rulemaking, has provided in its regulations examples of activities that it found to satisfy the definition of "begin actual

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[4] 40 C.F.R. § 52.21(b)(11); *see also* Memorandum, *supra* note 3, at 1–2, 12–13. This definition has been in place since 1980.

[5] Memorandum, *supra* note 3, at 13.

construction" and therefore are prohibited until a source has obtained an NSR permit.[6] EPA cannot undue its plain regulatory language by merely proffering a new interpretation that is contrary to the existing regulatory text or depart from decades of permitting decisions and guidance therein without a reasoned basis. To allow "installation of building supports and foundations" before securing an NSR permit, EPA must undertake a notice-and-comment rulemaking to modify the regulatory definition. However, as we next discuss, the statutory text of the Clean Air Act would bar this change.

Allowing Construction Before Obtaining an NSR Permit Conflicts with the Clean Air Act and Undermines the NSR Program.

Even if EPA were to undertake notice-and-comment rulemaking to change the regulatory definition of "begin actual construction," EPA's proposed new interpretation is contrary to the Clean Air Act. Sections 165(a) and 172(c)(5) explicitly prohibit construction on new major stationary sources without first securing a permit subject to notice and comment and containing the enumerated requirements.[7] EPA acknowledges this.[8] Indeed, the Clean Air Act's construction prohibition—and even EPA's mirroring regulatory prohibition[9]—preclude EPA's proposed new interpretation: the Act prohibits construction of a new major stationary source before obtaining a permit, while EPA's proposal would only prohibit construction of a new emissions unit and allow construction of everything else. The purported statutory (or additional regulatory) ambiguity EPA seeks to rely on regarding "*when* physical on-site

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[6] Rearranging the first sentence into EPA's illustration of the sentence's "five distinct criteria" (Memorandum, *supra* note 3, at 13) makes this even clearer. In this alternative form, the definition would read:

> Begin actual construction means, in general, initiation of activities that (1) are physical in nature; (2) that are undertaken on-site; (3) that involve construction; (4) that are on an emissions unit; and (5) that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

The second sentence obviously is providing examples of "activities" EPA has already found to satisfy "begin actual construction" and its "five distinct criteria"—including "on an emissions unit."

[7] 42 U.S.C. § 7475(a) ("*No major emitting facility* on which construction is commenced after the date of the enactment of this part, *may be constructed* in any area to which this part applies *unless*—(1) *a permit has been issued for such proposed facility* in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part . . . ." (emphasis added)); *id.* § 7502(c)(5) ("Such plan provisions *shall require permits for the construction* and operation *of new or modified major stationary sources* anywhere in the nonattainment area . . . ." (emphasis added)).

[8] Memorandum, *supra* note 3, at 3.

[9] 40 C.F.R. § 52.21(a)(2)(iii) ("*No new major stationary source* or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply *shall begin actual construction without a permit* that states that the major stationary source or major modification will meet those requirements." (emphasis added)).

'construction' activities can be said to have begun"[10] is not resolved by impermissibly narrowing the construction prohibition scope to an emissions unit.

This narrowed scope does not even make inherent sense. Without the emissions unit, there is no impetus for the construction. No one is meant to build all of a power plant but the boiler; allowing such choices is economically and legally irrational. Moreover, as permitting decisions may well affect overall facility design—including the design of additional controls, the need for electricity to run them, foundations to support them, or even different fueling choices—there is no way to rationally design a facility without designing its emissions unit. In other words, the design of the emissions unit is intimately tied up with the design of the facility; a critical piece of the design is what controls it will be subject to as determined by the permitting authority.[11] Allowing sources to construct major facilities sans emissions units prior to obtaining an NSR permit seems to only serve to put an improper thumb on the scale of the permitting decision.

Thus, at core, allowing pre-permit construction undermines the NSR program. Congress specifically created the NSR Program to function as a preconstruction program by which EPA or state and local permitting authorities review proposed new major facilities or modifications to existing facilities before construction to impose appropriate emission limitations and controls, ensuring emissions in the designated area did not worsen.[12] Allowing new major stationary sources to construct building foundations and supports before securing an NSR permit subverts the entire premise of a preconstruction permit. A regulation contrary to this language, structure, and intent would be void—and this new "interpretation" plainly is.

EPA Provides No Justification for Abandoning Its Long-Held and Still Legitimate Concern About "Equity in the Ground."

EPA's proposed new "interpretation" further undermines the NSR Program by inappropriately abandoning a longstanding and critical guiding principle for the Program. Since the inception of its NSR regulations in 1978, EPA has been concerned with "equity in the ground," or that a permitting agency would face increased pressure from a project that has at least partially constructed or began construction to issue an NSR permit that the agency might not otherwise have issued. Now, EPA finds it "implausible" that permitting authorities or NSR permit applicants will, respectively,

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[10] Memorandum, *supra* note 3, at 4 (emphasis added).
[11] EPA's Transition Program for Equipment Manufacturers (TPEM) can serve as another illustration of this. TPEM allows manufacturers of non-road equipment to continue to use lower-tiered diesel engines in their existing machinery. The machinery, though not necessarily an emissions unit by itself, dictates what emissions unit, i.e. diesel engine, can be used within its design. The TPEM shows EPA's new distinction between an emissions unit and the construction that supports that emissions unit are not separate, independent variables.
[12] *See, e.g.*, Clean Air Act §§ 165, 167, 173; 42 U.S.C. §§ 7475, 7477, 7503.

be susceptible to pressure or expect to gain leverage from "equity in the ground," given the 40 years of NSR permitting. Other than the passing time, EPA offers no real support for its changed belief.

Experience in California, at least, has shown that even after decades of NSR, permit applicants still claim "equity in the ground" to push back on regulatory analysis. This remains an active concern with which at least some of California's local air districts grapple. Moreover, major source thresholds shrink with greater levels of nonattainment, thereby increasingly encompassing new and often less sophisticated sources. California has experienced this firsthand, as several areas unfortunately were forced to bump up their nonattainment designation over the years, and CARB is currently working with at least one air district and EPA Region 9 on another. "Equity in the ground" concerns and other pressures from regulated entities never truly go away when the pool of applicants and permitting authorities' resources are dynamic.

EPA's apparent new belief to the contrary is misplaced. For EPA to dismiss the momentum created by "equity in the ground" (and that equity being used to justify a lesser emission standard) as being "implausible" is to ignore the imperative of equity in the formation of emission standards in the Clean Air Act itself and EPA's regulations. The distinction made in the Clean Air Act between the highest emission standards ("lowest achievable emission rate" or "best available control technology") required for new or voluntarily modified sources and a lesser standard ("reasonably available control technology") required of existing sources rests on the existing sources having equity in the ground and therefore enjoying the presumption of fewer feasible, cost-effective control options.[13] Another example is EPA's Transition Program for Equipment Manufacturers (TPEM), which allows manufacturers of non-road equipment to use diesel engines that meet a lower-tier emission standard in existing equipment because EPA recognizes the "equity" of manufacturers in existing machinery.

If equity is a rationale to not require the highest emission standards, then EPA's new "interpretation" of "begin actual construction" will give this rationale a foothold in NSR permitting where Congress never intended it to be. Because EPA must provide a rational reason for its change of position and cannot do so, the interpretation cannot be finalized.[14]

In sum, EPA's "begin actual construction" draft guidance document seeks a substantive regulatory change disguised as an "interpretation" without required notice and comment." This draft guidance also conflicts with the Clean Air Act. The proposed new "interpretation" destabilizes the preconstruction principle of NSR and

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[13] *See, e.g.*, Clean Air Act §§ 165(a)(4), 172(c)(1), 173(a)(2); 42 U.S.C. §§ 7475(a)(4), 7502(c)(1), 7503(a)(2).
[14] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

invites more pressures and burdens on local air agencies and greater uncertainty in the NSR permitting process. CARB urges EPA to withdraw the document.

Thank you for considering CARB's perspectives on these important issues. If you have questions or would like further information please do not hesitate to contact me at richard.corey@arb.ca.gov.

Sincerely,

Richard W. Corey
Executive Officer

May 11, 2020

The Honorable Ms. Anne L. Idsal
U.S. Environmental Protection Agency
Office of Air and Radiation
1200 Pennsylvania Avenue NW
Washington, DC 20004

Re: Comments on the U.S. Environmental Protection Agency's Memorandum "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations"

Dear Ms. Idsal,

The U.S. Chamber of Commerce and Associated Builders and Contractors appreciate the U.S. Environmental Agency's (EPA) efforts to provide clarification to the interpretation of the term 'begin actual construction' in the EPA regulations implementing the major New Source Review (NSR) permitting program. We collectively offer the following comments on EPA's efforts.

Our organizations represent a broad swath of the business and construction industry that are generating jobs, building communities, and providing products and services for the American people. We are supportive of effective air quality programs that allow our members to start and complete projects in a timely and affordable manner while fostering job creation, economic growth, and environmental progress in the process.

Coordinated, predictable and transparent processes that clarify and streamline permitting will enable our members to plan and execute even the most complex projects while safeguarding our communities, maintaining a healthy environment and being good stewards of public funds. Our members take the appropriate measures that are required of them to comply with federal and state permitting processes and to help meet the attainment goals of ambient air quality standards under the NSR Prevention of Significant Deterioration (PSD) program.

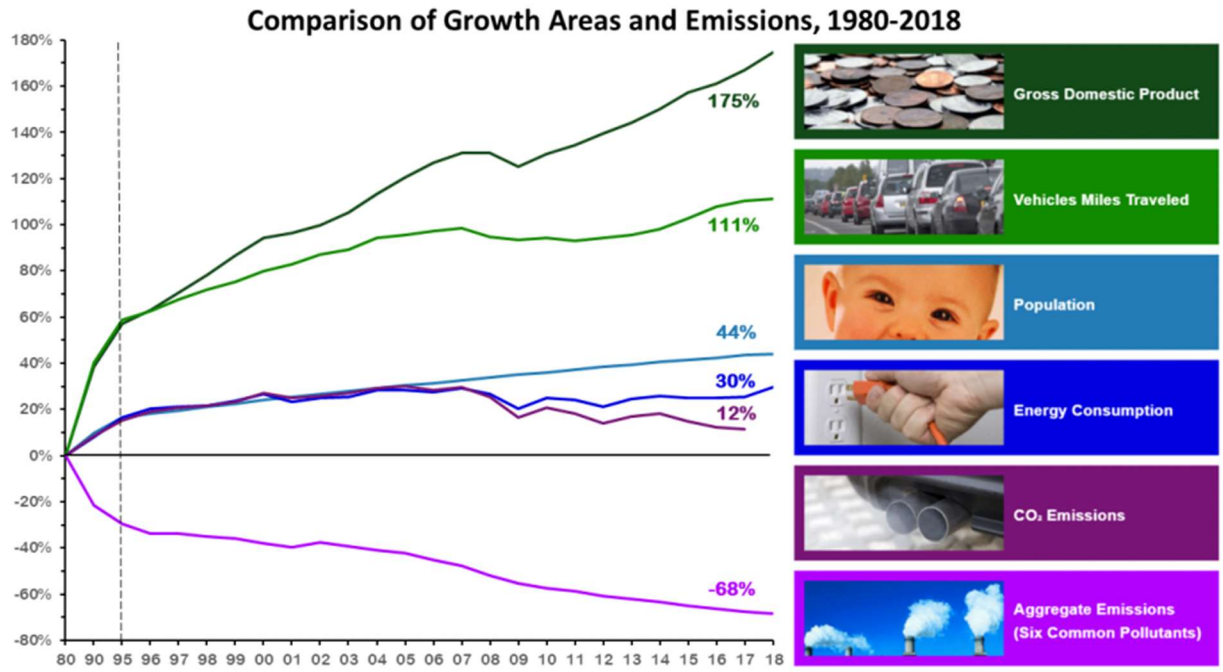
I. Significant Air Quality Improvements Have Been Made Over the Last Few Decades

Across decades of planning and investment, businesses have worked with EPA and their state partners to lower concentrations of criteria air emissions. These emissions reductions have occurred while the U.S. economy, population, and energy use have steadily grown—undoubtedly a testament to successful collaboration between EPA, states, and industry to adopt new emissions control technologies and practices in a sound, cost-effective manner.

EPA's 2019 Air Trends and National Emissions Inventory report details this progress.[1] The report shows that the aggregate emissions from all six criteria pollutants have declined by 68 percent since 1980. The annual 8-hour ozone concentrations have declined by 31 percent since 1980, with 16 percent of that reduction happening since 2000. Total sulfur dioxide (SO2) and nitrogen oxide emissions (NOx), which may contribute to the secondary formation of PM2.5 precursors under certain atmospheric conditions, were reduced by 91 percent and 65 percent, respectively, since 1980; with 80 percent of the sulfur dioxide and 49 percent of the nitrogen dioxide emissions being reduced since 2000. For PM2.5,

[1] National Air Quality: Status and Trends of Key Air Pollutants, EPA, July 12, 2019, https://www.epa.gov/air-trends

the annual concentrations have declined by 39 percent since 2000. Looking back to 1980, these reductions have occurred while U.S. gross domestic product has increased by 175 percent, vehicle miles traveled have increased by 111 percent, and energy usage increased by 30 percent. The below chart depicts this simultaneous advancement of both the economy and environmental progress.



National Air Quality: Status and Trends of Key Air Pollutants, EPA, July 12, 2019, https://www.epa.gov/air-trends

II. Simplification and Clarification in the Permitting Process Will Help Spur Economic Growth and Maintain America's Competitiveness

Many forms of infrastructure are necessary to move people, goods, energy, and information across the country via pipelines, transmission lines, railroads, highways, waterways, and ports. Major investments are needed to repair, upgrade, and build new infrastructure to keep up with our growing population and demand for high quality infrastructure.

In order to maintain American's competitive edge and attract the world's investments, the U.S. will need to increase its investment in quality infrastructure. The American Society of Civil Engineer's gave American infrastructure a D+ grade in their 2017 report card. They gave energy infrastructure a D- and estimated the need for investment at close to one billion dollars to meet growing energy demand and technology innovation.[2] Across many sectors, the U.S. has considerable investments to make in order to spur economic growth and maintain a competitive edge that will provide both immediate and long-term benefits for local communities and the U.S. as a whole.

Many areas in the U.S. may miss out or are already missing out on the full benefits of improved infrastructure and the efficient delivery of goods and services because it is difficult to permit new as well as modify or replace existing critical infrastructure. A U.S. Chamber of Commerce flow chart shows the

[2] 2017 Infrastructure Report Card, American Society of Civil Engineers, https://www.infrastructurereportcard.org/

arduous and complex process that project proponents must complete in order to develop a pipeline project, including the potential for going through NSR review.[3]

Due to the overlaying complexity of the permitting process and unnecessarily long permitting delays, we support policy changes that will help build infrastructure to meet not only the needs of today, but those that will emerge tomorrow. Policy updates, such as the guidance that is the subject of these comments, must ensure timely reviews of projects related to critical infrastructure and streamline permitting at the federal and state levels.

III. The Revised Interpretation is Needed to Support More Efficient Project Development and Reduce Permitting Costs

The NSR preconstruction permitting program has long suffered from uncertainty regarding 'where on the continuum from initial planning to operation'[4] that a source owner or operator must have a permit before proceeding with certain construction activities. The decision regarding where to draw this line for what construction is permissible prior to receiving an NSR permit has been left to EPA rulemaking and guidance documents.

Unfortunately, EPA's guidance from the 1970's to today has progressively limited the extent and types of preconstruction activities that project proponents may engage upon or 'construct' prior to receiving their NSR permit. This has often led to a hold on all pre-permit construction activities and unnecessarily long delays in project development. For example, natural gas combined cycle power plants are delayed as much as 3.5 years on average due to the time-consuming NSR permitting process.[5] When these delays are compounded across thousands of projects, they are costly and have detrimental effects on economic efficiency and productivity.

Below are a few anecdotal examples of how the overreaching past guidance on what constitutes 'begin actual construction' has led to inefficiencies in project development, inefficiencies in permitting agency resources, and increased the likelihood that permit conditions are outdated by the time facilities begin actual construction on a project:

- Upgrading natural gas capacity to a facility requires an already long lead-time for planning due to complex pipeline installation, planning, and permitting that typically ends at a tie-in point at the project sponsor's fence line. A facility may choose to upgrade its natural gas capacity to secure better fuel pricing compared to its existing fuel supply or provide fuel security by diversifying their options. Under the prior guidance's overly narrow interpretation, the tie-in of the additional gas capacity might be considered 'begin actual construction' and thus require an air permit even without any modifications or process changes to the emissions unit.
- For a facility that is planning for a major modification requiring an air permit, site preparations will be necessary to ensure all systems are carefully prepared including adding shutoff valves to

[3] What's It Take to Build Pipelines In America?, Global Energy Institute, https://www.globalenergyinstitute.org/sites/default/files/Pipeline-Flowchart%20Final.PDF

[4] Memorandum, Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to U.S. EPA Enforcement Division Directors, Regions I-X (December 18, 1978).

[5] EPA's New Source Review Program: Evidence on Processing Time, 2002-2004, Art Fraas, Mike Neuner, and Peter Vail, Resources for the Future, February 2015. https://www.rff.org/publications/working-papers/epas-new-source-review-program-evidence-on-processing-time-20022014/

process pipes that convey water or steam. For power sector applications, it is critically important to complete any necessary site preparations during the short periods of time that a unit is in outage. The valve installation, although not part of the 'emissions unit' might have been considered 'begin actual construction' possibly requiring an NSR permit even though it is unrelated to the emissions unit.

- Requiring an NSR permit to build a bridge in order to gain access to the site to begin site clearing and grading is another example of the overreaching nature of the interpretation of 'begin actual construction' in prior NSR permits. Clearing and grading were allowable under the prior guidance interpretation; however, building the bridge might not have been permitted without an NSR permit as the prior interpretation precluded building any permanent structure and the bridge would have been considered essential to the operation of the emissions unit.

Increased permitting times impose direct costs on project sponsors due to the investment of staff time and the requirement to answer questions of regulators and the public during the permit review process. There are also costs to project sponsors due to opportunity costs from delays in starting-up operations of a manufacturing facility, power plant, pipeline, or other project. In addition, project sponsors may also have to pay penalties in their contracts to engineering and construction companies resulting from delays in the start of construction.[6] Project construction uncertainty can make projects unprofitable and prone to litigation between the owner and the contractors. Project sponsors may also miss opportunities for better financing or deadlines for certain tax breaks. The longer a permit decision is delayed the more costly a project will be to complete, sometimes leading to a project's cancellation.

Restrictive policies on what can be constructed prior to receiving an NSR permit also lead to the inefficient use of permitting agency resources by increasing the likelihood that permit conditions are outdated by the time sponsors begin actual construction on a project. In this type of situation, it may be necessary for the project sponsor to commit more resources to revise air modeling to update the permit conditions and go through further agency review.

As the complexity and duration of NSR permitting has evolved over the years, submission of air permit applications frequently becomes the critical path for the completion of a project. The complexity and length of the New Source Review process often drives premature decisions on project elements necessary for permit applications, ahead of when they would otherwise be determined in an optimal project design sequence. For example, deciding on a boiler capacity while still designing project elements that will impact the final project steam demand is less than optimal. This inevitably leads to inefficient permit revisions and rework of permit criteria by both the facility and the permitting agency.

IV. EPA Should Make Clear that 'Emissions Unit' is Narrowly Focused on Equipment that Causes Emissions or Directly Impacts the Magnitude of Emissions

The application of the term 'emissions unit' in the NSR permitting context should be clearly and narrowly focused on equipment that causes emissions or directly impacts the magnitude of emissions (*e.g.*, equipment components that are the basis for emissions factors or manufacturer emissions guarantees).

[6] EPA's New Source Review Program: Time to Reform?, Art Fraas, John Graham, and Jeff Holmstead, Environmental Law Institute, 2017, https://media.rff.org/archive/files/document/file/47%2010026.pdf

Further clarification around the term 'emissions unit' is an area EPA's draft guidance could be improved upon. While we recognize there will be certain scenarios where sources and permitting authorities will need to make case-specific determinations as to the scope of an 'emissions unit,' it would be helpful to have further clarity in the guidance as to what types of construction activities are generally not considered construction on an 'emissions unit' and which activities are considered construction.

Additional clarity of this term would be helpful to assure the coordination of construction activities align with the regulatory definition of 'begin actual construction.' One possible means of providing more clarity would be to include in the guidance, examples of construction activities that would generally be permissible prior to issuance of an NSR permit because they are not construction on an emissions unit. For a boiler or process unit, the construction of accommodating installations, such as concrete foundations to support the boiler or process unit should not be considered part of the 'emissions unit.' Instrumentation buildings and control rooms are also examples of components that may accommodate an emission unit but are not themselves part of an emissions unit.

The context EPA provided in the draft guidance for determining an 'emissions unit' does not provide sufficient clarity to the revised interpretation. First, the reliance on sites and permitting agencies to determine the 'emissions unit' on a case-by-case basis creates uncertainty as to what items of interest could occur or be constructed before a permit is issued. Sites will likely have engagement with permitting agencies ahead of permit issuance and can informally align on emissions unit interpretation, but asking permitting agencies to formally concur on allowable pre-permit activities on a case-by-case basis may lead to inefficient and inconsistent application of the guidance. Accordingly, case-specific determinations should be permissible to allow some agency flexibility, but should primarily be used for unique or uncommon situations that can't readily be characterized in this guidance document.

Second, correlating the New Source Performance Standards (NSPS) or National Emissions Standards for Hazardous Air Pollutants (NESHAP) criteria for defining an affected source would create inconsistency and unneeded confusion on the definition of an emissions unit. The intent of the NSPS and NESHAP is a distinctly different context than what is relevant for consideration in characterizing an 'emissions unit' for NSR 'begin actual construction' purposes. For NSPS/NESHAP standards, it may be appropriate at times to look at groups of emission units collectively for control purposes, whereas for NSR 'begin actual construction' consideration, the focus should be on what construction activities are part of the emissions units.

V. "Equity in the Ground" Should not be Considered a Factor of Influence on the Permitting Agencies' Decision to Grant an NSR Permit

The permitting authorities will be making their decision on the submitted NSR application as opposed to any of the preconstruction, in the ground, work that a project sponsor may pursue prior to receiving their permit. Nor should project sponsors assume that undertaking pre-permit onsite construction activities would grant them leverage with respect to the outcome of the permit.

With over four decades of experience in NSR permitting, permitting agencies have ample access to precedential information to evaluate case-specific items in NSR permits, such as control technology evaluations of the Best Available Control Technology (BACT) for NSR PSD permits. The permitting agencies have leverage in such equity in the ground situations, as facilities bear the interest in timely issuance of permits to align with capital spending plans and avoid missing opportunistic market conditions that may only exist for limited time periods. Accordingly, facilities with equity in the ground

may be more inclined to agree to more stringent permit conditions (beyond what may appropriately be considered as BACT) to avoid delays in permit issuance.

VI. Conclusion

Our associations have long supported the efforts to provide regulatory clarity under the NSR program, while ensuring that the program's intended benefits are preserved. The complexity that has evolved around every aspect of implementing this program has made simple decisions unnecessarily complex. The consequences of these complexities include elevated investor risk, thereby creating a reluctance to invest in needed infrastructure to meet America's future needs.

We support EPA's efforts to provide clarity to the interpretation of 'begin actual construction' under the NSR program as it will support both economic progress and the environment. Providing this clarity is consistent with Clean Air Act Section 101(b)(1)'s statement of purpose of protecting and enhancing the nation's air resources to promote both the public health and welfare and the productive capacity of the country.

Associated Builders and Contractors
U.S. Chamber of Commerce

First Name: Tye
Last Name: Baker
Organization: Choctaw Nation of Oklahoma Email address: tbaker@choctawnation.com
Comment:
Interpretation of “Begin Actual Construction” Under the New Source Review Preconstruction Permitting Regulations Per the Environmental Protection Agency’s (EPA) request, the Choctaw Nation of Oklahoma (Choctaw Nation), as an interested stakeholder, is reviewing and commenting on the EPA’s draft guidance titled, Interpretation of “Begin Actual Construction” Under the New Source Review Preconstruction Permitting Regulations.
The purpose of the NSR program is to protect public health and the environment, even as new industrial facilities are built, and existing facilities expand. Specifically, its purpose is to ensure that air quality:
• does not worsen where the air is currently unhealthy to breathe (i.e. nonattainment areas)
• is not significantly degraded where the air is currently clean (i.e. attainment areas)
The Choctaw Nation incorporates a long-term sustainable approach to the development and practice of our governmental, commercial and industrial endeavors. We strategically utilize areas within our treaty territory to benefit the proliferation of economic activity for increasing the quality of life for our tribal members while seeking to protect natural resources and the environment for generations to come. In doing so, the Choctaw Nation also practices and applies sound environmental policy to achieve compliance with our own regulation(s) as well as applicable Federal regulatory standards. We understand the importance of realizing our impacts to the environment through monitoring, documenting, and incorporating data with national data to know the cumulative effects pollution may be having on public health. We believe everyone should be aware of their own impacts and follow applicable regulatory compliance protocol.
The Choctaw Nation has greatly advanced our economy to better serve our tribal members. In doing so, we have benefited all southeastern Oklahoma in many ways, including becoming the largest employer in the region. In some instances, we manage our own construction and development projects. Many of these projects require substantial planning and forethought to understand the impact of the project and gaining proper data for permits. Many projects evolve according to building sites, necessary infrastructure, financial resources, construction constraints, and other external factors. Compliance has been known to be a moving target or one that is difficult to obtain based on the progression of project planning. For example, the size of a boiler or the necessary output of a generator may not be fully understood until very far along into the construction process due to changes to the project. Market variances for equipment may also contribute to an inability to identify the proper information for determining emission values because the different brands, models, sizes, or types of machinery or equipment may yield different emission numbers.
In an interest to conserve resources and more easily manage large projects, many entities including Tribal Nations, have utilized a Design-Build delivery system for project development. Through this system, the owner typically must only manage a single or very few points-of-contacts for the delivery of the project. Therefore, an owner may not realize emission equipment data until some later point in the project other than the pre-construction phase of the project planning. The Design-Build delivery system may be essentially abolished unless the interpretation of “begin actual construction” is revised.
Further interpretation of the NSR review is done based on a typical construction delivery method of design/bid/build. Where all permitting is done on the basis of a completed design prior to the start of construction.
The Design-Build delivery model is one that enhances the construction schedule with phased packages to allow for projects to start in a phased, yet controlled approach related to design. That phased

approach typically includes a design assist from major subcontractors however that iterative process does not typically happen prior to the start of construction. Because of the schedule and cost savings of this approach we would not be privy to the typical design calculations of the sources of emissions at the time of construction start. This information would only be available through the typical design iterative and the MEP basis would not have been realized till at least after sitework, infrastructure and initial early construction trades have started.

Another important note to realize is that through the trust application status through BIA land is put into trust prior to any development taking place on that land. This mitigates the typical development process of entitlement where permitting is addressed in a general review setting through local jurisdictions affected by the project. As a result of not being subject to the typical entitlement process the basis for permitting could not come until after land is put into trust and as a result of the trust status land is not subject to typical permitting authorities required to the normal permitting/development process. The lengthy basis of putting a property into trust is enhanced with the design build process as this deliverable is design to gain time back (lost due to trust permitting) as a result of an Integrated/Iterative project delivery model design for speed and efficiency.

The current interpretation of “begin actual construction” is one that requires that emissions equipment be fully determined and calculations for potential-to-emit be realized many months prior to construction mobilization.
Another issue with this interpretation includes difficulty in consistently applying this standard across various projects.
Based on experience and a wide range of construction projects, the Choctaw Nation supports an interpretation of “begin actual construction” under the regulations implementing the New Source Review (NSR) permitting program as one that takes into consideration construction practices that may not realize proper emissions data until construction of the actual emissions equipment or installation of pre-fabricated equipment or engines. Permit approval prior to installation and operation of qualified emissions equipment is needed to meet the goals of the New Source Review (NSR) Program and the Clean Air Act. However, modifying application and permitting deadlines of the NSR program to allow for substantial progress on the project would ensure better data for calculations of emissions. As well as allowing for Tribal entities and others to utilize different project development techniques for better use of their resources. Interpreting the rule that classifies “begin construction” as construction of the actual emissions equipment or installation of pre-fabricated equipment or engines is one that can still meet regulatory goals. This will provide owners/developers with additional ability to use appropriately sized equipment while staying in compliance with NSR program standards. Allowing for the installation of infrastructure, support structure and other physical on-site construction of a permanent nature could still allow for satisfying NSR program requirements while commencing construction activities. Further, the owner of the development would still need to conform to managing emissions in accordance with applicable National Ambient Air Quality Standards and permit requirements of the NSR program while ultimately operating the facility.
Additional program amendments or consideration may include:

- Pre-permit assessments, estimations of emissions, or equipment classifications to provide an owner/developer with coverage while in the construction process.
- Expansion of exemptions, including greater emergency generator outputs, on non-industrial facility types.
- Expansion of the streamlined General Permit inclusions. Specifically, for

those facilities that are not constructing emission equipment on-site and a broader range of generator/boiler types and sizes with special consideration for facilities emitting very low hazardous air pollutants.

- Generators for the sole use of emergency backup support may be identified after construction of the facility yet permitted prior to being set into operation.

COMMENTS OF THE CLASS OF '85 REGULATORY RESPONSE GROUP

ON THE

DRAFT GUIDANCE MEMORANDUM REGARDING THE INTERPRETATION OF "BEGIN ACTUAL CONSTRUCTION" UNDER THE NEW SOURCE REVIEW PRECONSTRUCTION PERMITTING REGULATIONS

I. INTRODUCTION

On March 25, 2020, the United States Environmental Protection Agency ("EPA" or "Agency") released a draft guidance memorandum ("Draft Guidance") interpreting the definition of "begin actual construction" under the New Source Review ("NSR") regulations. The Draft Guidance would revise EPA's interpretation of the definition of "begin actual construction" such that a source owner or operator would be allowed to undertake certain physical on-site construction and installation activities—even ones that may be costly, that may significantly alter the site, and/or that are permanent in nature—prior to obtaining an NSR permit, provided the activities do not constitute physical construction "on an emissions unit." Under EPA's proposed interpretation, an "installation necessary to accommodate" an emissions unit would not be considered part of the emissions unit, and construction activities that involve such "accommodating installations" could be undertaken in advance of the issuance of an NSR permit. The Draft Guidance reaffirms that, "[a]s has always been the case, any on-site construction or preparatory activity that a permit applicant undertakes prior to receiving a required NSR permit will be at the applicant's own risk."[1]

According to the Draft Guidance, the revised interpretation would apply to the definition of "begin actual construction" in the EPA regulations implementing the major NSR permitting program: the Prevention of Significant Deterioration ("PSD") regulations,[2] the regulations setting forth the requirements for NSR state implementation plans ("SIPs"),[3] and the interim Nonattainment NSR ("NNSR") program for states without an approved NNSR SIP for a particular nonattainment pollutant,[4] all of which have essentially identical definitions of "begin actual construction."[5] In addition, the revised interpretation also would be applicable to minor sources or minor modifications of major sources on tribal lands, because the federal

[1] Draft Guidance at 14.

[2] *See* 40 C.F.R. § 52.21(b)(11).

[3] *See* 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11).

[4] *See* 40 C.F.R. Part 51, Appendix S II.A.17.

[5] Throughout the Draft Guidance, EPA cites primarily to the federal PSD regulations for simplicity; however, the Agency interprets the major NSR preconstruction requirements in the SIP and NNSR regulations consistently with the federal PSD preconstruction requirements. Accordingly, EPA intends for the revised interpretation of "begin actual construction" to apply to those NSR provisions as well. *See* Draft Guidance at 1–2, n.2.

implementation plan ("FIP") for such sources in Indian country defines "begin construction"[6] consistently with the definition of "begin actual construction" in the federal major NSR regulations.[7] Finally, EPA notes that state and local permitting authorities that incorporate a consistent definition of "begin actual construction" in their minor NSR programs may apply the Agency's revised interpretation to their minor sources at their discretion.[8]

The Class of '85 Regulatory Response Group ("Class of '85" or "Group") respectfully submits these comments on the Draft Guidance.[9] The Class of '85 is a voluntary, ad hoc coalition of over 35 electric generating companies from around the country that has been actively involved in the development and implementation of Clean Air Act rules affecting the electric generating industry for nearly 30 years—including EPA's NSR regulations. Members of the Class of '85 own and operate electric generating units throughout the United States. If EPA finalizes the Draft Guidance, the Class of '85 would be affected by the resulting change in the NSR regime—particularly if state and local permitting authorities that implement EPA-approved NSR programs adopt EPA's proposed interpretation of "begin actual construction."

II. COMMENTS

A. The revised interpretation could provide owners and operators with greater confidence in decisions to proceed with construction.

EPA notes in the Draft Guidance that the Agency's longstanding interpretation of "begin actual construction" may "preclude source owners/operators from engaging in a wide range of preparatory activities they might otherwise desire to undertake for the purpose of ensuring the project is positioned to move forward in an expedient manner prior to obtaining an NSR permit."[10] The Class of '85 agrees with EPA's statement and believes EPA's revision to the interpretation of "begin actual construction" would provide source owners and operators with greater confidence in decisions to undertake physical on-site activities in preparation for constructing a major source or making a major modification to an existing source prior to obtaining an NSR permit, especially if state and local permitting authorities adopt the revised interpretation.

To date, EPA has considered almost every physical on-site construction activity that is of a permanent nature to be "actual construction," even if the activity does not directly involve construction "on an emissions unit." For example, under EPA's existing guidance, work that could not be performed prior to obtaining an NSR permit would "include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent

[6] *See* 40 C.F.R. § 49.152(d).

[7] *See* Draft Guidance at 1 n.1.

[8] *Id.*

[9] Attachment A contains a list of the Class of '85 members who support these comments.

[10] Draft Guidance at 2.

storage structures, and activities of a similar nature."[11] Accordingly, under the current interpretation of "begin actual construction," delays in the issuance of an NSR permit can force owners and operators to fall behind schedule on construction timelines because undertaking permanent preparatory activities is prohibited. This can be a problem—particularly in cold-weather climates, where a fall or wintertime approval of an NSR permit application often means that construction cannot feasibly begin until the advent of warmer weather several months after permit approval. Further, if the project cannot be completed during a single construction season, its completion must be delayed to the next construction season. Such delays can result in the postponement of the deployment of important projects that serve the public need, and also can jeopardize investments and potentially disrupt business operations.

Further, companies often avoid undertaking on-site activities prior to permit approval, even if they are confident that such activities would not constitute the beginning of actual construction, so that they can avoid the appearance of construction that could trigger opposition from third parties or even citizen suits. To be conservative, companies will choose to forego undertaking on-site activities if they could be second-guessed under EPA's current interpretation.

EPA's revised interpretation of "begin actual construction" would mitigate these issues by clarifying that owners/operators may begin advance construction on infrastructure that will support the emissions unit, thereby enabling an immediate start of construction on the emissions unit once the NSR permit is issued. Clarifying that owners/operators may proceed with construction activities that do not constitute physical construction on an emissions unit—even activities that may be costly, may significantly alter the project site, or are permanent in nature—could help keep projects on schedule and avoid uncertainty as to the types of activities that can be undertaken prior to permit issuance.

The Group recognizes that an owner/operator would undertake such pre-permit construction activities at their own risk pursuant to the revised interpretation; however, this aspect of the Draft Guidance is consistent with EPA's approach in prior interpretive NSR guidance. The Class of '85 believes that source owners and operators would be able to draw on their experience in navigating the flexibilities of EPA's NSR guidance while balancing their own regulatory risks when making project decisions.

B. The revised interpretation should not apply to the requirement to commence continuous construction of a source within 18 months of permit issuance.

Under 40 C.F.R. § 52.21(r)(2) in EPA's PSD regulations, "[a]pproval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time."[12] A source has "commenced construction" when the owner or operator has obtained all required preconstruction approvals or permits and either has (1) begun, or caused to begin, a continuous program of actual on-site construction of the source;

[11] Memorandum from Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to U.S. EPA Enforcement Division Directors, Regions I–X (Dec. 18, 1978).

[12] *See* 40 C.F.R. § 52.21(r)(2).

or (2) entered into binding agreements or contractual obligations—which cannot be cancelled or modified without substantial loss to the owner or operator—to undertake a program of actual construction of the source.[13] EPA should clarify that the revised interpretation of "begin actual construction" would not impact a determination that continuous construction has "commenced" within 18 months. Failure to make this clarification could have the effect of suggesting that owners/operators are *required* (rather than merely allowed) to undertake pre-permit physical on-site construction that is not on the emissions unit.

EPA states in the Draft Guidance that the terms "commence construction" and "begin actual construction" each "speak[] to a different concept, and the two terms are not interchangeable."[14] However, because the definition of "commence construction" incorporates the concept of beginning actual construction, the Class of '85 is concerned that the Draft Guidance could nevertheless be interpreted to mean that commencing construction *on the emissions unit itself* is required to satisfy the "continuous construction" requirement. For example, if an owner/operator has obtained its PSD permit and enters into binding contracts for construction, they have "commenced construction" of the source. If the owner/operator then engages in more than 18 months of preparatory construction work on portions of the source that are *not* the emissions unit, the Draft Guidance could be interpreted to mean that construction has been discontinued because no work has been done on the emissions unit itself. Such an interpretation would trigger the potential invalidation of the PSD permit in this circumstance,[15] thereby unfairly penalizing the source for choosing not to risk engaging in preparatory construction activities prior to permit issuance.

EPA should clarify that the revised interpretation of "begin actual construction" would not impact a determination that continuous construction has "commenced" within 18 months. This clarification would be consistent with the PSD requirement that a source begin "a continuous program of actual on-site construction of the source" (or enter into binding obligations to effectuate the same) within 18 months of receiving its PSD permit. As EPA explains in the Draft Guidance, an "emissions unit" is part of a stationary source.[16] The "begin actual construction" restriction applies to construction done on an "emissions unit,"[17] whereas the "commence" construction definition applies to construction done on the "source."[18] Accordingly, work that would *not* be considered construction on the emissions unit—such as pouring concrete for the foundation of a building that will house the emissions unit, but is not part of the emissions unit—should still qualify as "construction" of the source for purposes of

[13] *See* 40 C.F.R. § 52.21(b)(9).

[14] *See* Draft Guidance at 4 n.8.

[15] The regulations allow the permitting authority to extend the 18-month period "upon a satisfactory showing that an extension is justified." 40 C.F.R. § 52.21(r)(2). However, the option for an extension does not resolve the issue because it is dependent upon the permitting authority's discretion.

[16] *See* Draft Guidance at 16.

[17] *See, e.g.*, 40 C.F.R. § 52.21(b)(11).

[18] *See, e.g.*, 40 C.F.R. § 52.21(b)(9).

determining whether the owner/operator is engaging in a continuous program of construction for purposes of maintaining a valid PSD permit.

The Class of '85 appreciates that EPA's revised interpretation would *allow* a source owner or operator to undertake pre-permit physical on-site construction that is not on the emissions unit, but EPA should make clear that the owner/operator is not *required* to do so. Owners/operators would be undertaking pre-permit activities at their own risk; thus, it is within their discretion to determine whether and how much construction to do before their PSD permit is approved. If an owner/operator chooses not to begin any physical on-site construction until obtaining the PSD permit, and if the permitting agency were to interpret the 18-month requirement as being satisfied only by construction "on an emissions unit," it might not be possible for the owner/operator to begin construction on the emissions unit within the 18-month window. Owners/operators should not be forced to assume such risks. To guard against this, EPA should clarify that its revised interpretation does not apply to the 18-month construction requirement.

C. EPA should encourage permitting authorities to apply the revised interpretation to minor source NSR programs.

EPA intends for the revised interpretation of "begin actual construction" to apply to the federal PSD regulations, the SIP requirements for state-administered NSR programs, and the interim NNSR program for states without an approved NNSR SIP.[19] EPA further explains in the Draft Guidance that the revised interpretation would be applicable to minor sources and minor modifications of major sources on tribal lands because the FIP for minor sources in Indian country defines "begin construction" consistently with the term "begin actual construction" as applied to major sources and major modifications under the federal NSR regulations.[20] EPA also notes that state and local permitting authorities with minor NSR programs that incorporate a consistent definition of "begin actual construction" may apply the revised interpretation to their minor sources at their discretion.[21]

EPA should encourage permitting authorities to adopt the revised interpretation for their minor source NSR programs to promote consistency across the country's preconstruction permitting programs, as it would confer the same benefits to minor source owners and operators that would be afforded to owners and operators of major sources under the Draft Guidance. Under the current interpretation of "begin actual construction," members of the Class of '85 have experienced minor source project delays similar to those faced by major sources as a result of prolonged waiting periods for minor NSR permit approvals. Should EPA finalize the Draft Guidance, the Group hopes that state and local permitting authorities will rely on EPA's guidance and adopt a consistent approach for both major and minor sources.

[19] *See* Draft Guidance at 1–2 n.2.

[20] *See* Draft Guidance at 1 n.1.

[21] *Id.*

D. The revised interpretation should be limited to the NSR program.

The Class of '85 urges EPA to clarify that the revised interpretation of "begin actual construction" applies only to a determination about the permissibility of construction activities under the NSR program. No other air programs that make regulatory determinations about a source based on the date the source begins construction should be impacted by the revised interpretation in the Draft Guidance. Failure to clarify this in the final guidance could result in consequences not intended by the Agency.

III. CONCLUSION

The Class of '85 appreciates the opportunity to comment on EPA's proposed interpretation of "begin actual construction." The Group urges the Agency to consider all implications of the Draft Guidance, and ensure that it provides greater clarity for source owners and operators as to the Guidance's interaction with the broader NSR program and other Clean Air Act regulations.

Dated: May 11, 2020

Respectfully submitted,

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Attachment A

AES Corporation
Alliant Energy Corporation
Arizona Public Service
Arizona Electric Power Cooperative, Inc.
Arkansas Electric Cooperative Corporation
Basin Electric Power Cooperative
Cleco Corporation
Cogentrix Energy Power Management, LLC
Dairyland Power Cooperative
Dayton Power & Light Company
Dominion Energy
Duke Energy
Entergy Services, LLC
Evergy, Inc.
Florida Municipal Electric Association
Florida Power & Light Company
Gainesville Regional Utilities
Great River Energy
Hawaiian Electric Company, Inc.
Indianapolis Power & Light Company
JEA
Lakeland Electric
Louisville Gas & Electric/Kentucky Utilities
Minnesota Power
National Grid
NextEra Energy, Inc.
NRG Energy
OGE Energy Corp.
Orlando Utilities Commission
PowerSouth Energy Cooperative
Public Service Company of New Mexico
Salt River Project
Talen Energy
Tampa Electric Company
Tucson Electric Power Company
Western Farmers Electric Cooperative
Xcel Energy Inc.

The Clean Energy Group

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May 11, 2020

Office of Air Quality Planning and Standards
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
(submitted to draft_permitting_guidance@epa.gov)

Re: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations Draft Guidance

To Whom It May Concern:

The Clean Energy Group appreciates the opportunity to comment on the Environmental Protection Agency's (EPA's) draft guidance memorandum addressing the interpretation of "begin actual construction" as defined under the major New Source Review (NSR) permitting program. The Clean Energy Group supports the draft guidance, which would allow physical on-site construction activities to occur prior to obtaining an NSR permit, provided that those construction activities do not constitute physical construction "on an emissions unit."

The Clean Energy Group member companies operate and manage fossil fuel, nuclear, hydropower, solar, wind, and other renewable generation as well as electricity and natural gas transmission and distribution systems across the United States. As owners and operators of facilities subject to the NSR regulations, our member companies have extensive experience with the NSR permitting program, including the requirement to obtain a permit before beginning actual construction. EPA states in the draft guidance that, under the current interpretation of "begin actual construction" under the NSR regulations, "almost every physical on-site construction activity that is of permanent nature" would be prohibited prior to obtaining an NSR permit. We agree that such an interpretation can lead to project delays and the inability to construct pursuant to staged schedules to account for seasonal restrictions.

In light of these concerns, we support EPA's decision to release this draft guidance to make clear that owners and operators of major sources can, "prior to obtaining an NSR permit, undertake physical on-site activities— including activities that may be costly, that may significantly alter the site, and/or are permanent in nature— provided that those activities do not constitute physical construction on an emissions unit, as the term is defined in 40 CFR §52.21(b)(7)." We also support EPA's conclusion that, under the revised interpretation, "an 'installation necessary to accommodate' the emissions unit at issue is *not* considered part of that emissions unit, and construction activities that involve an 'accommodating installation' may be undertaken in advance of the source owner or operator obtaining an NSR permit." The following comments are in response to specific aspects of the draft guidance.

I. We agree with EPA that the revised interpretation in the draft guidance is consistent with the NSR regulatory text.

As the draft guidance notes, the NSR permitting regulations provide that no major stationary source or major modification subject to the substantive requirements of the Prevention of Significant Deterioration (PSD) program can "begin actual construction" without a permit that states that the major stationary source or major modification

will meet the requirements of the PSD program. As further explained in the draft guidance, the term "begin actual construction" is defined as "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature" and includes, but is not limited to, "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." EPA's analysis of this definition in the draft guidance identifies the requirement that the activity be "on an emissions unit" as a key component.

Using installation of building supports and foundations as an example, EPA explains that if the building supports and foundations are "reasonably considered" to be part of the emissions unit, then the NSR permit would be required prior to conducting those activities. However, if they are not part of an emissions unit, then an NSR permit would not be required prior to conducting those activities. Similarly, using construction of permanent storage structures as an example, EPA explains that if the structure is not an emissions unit (e.g., an equipment storage building), construction of the structure can be initiated prior to obtaining an NSR permit; however, if the storage structure is an emissions unit (e.g., a petroleum tank), construction cannot begin prior to NSR permit issuance. We agree, as EPA notes, that placing the focus on activities that involve "construction…on an emissions unit" in the revised interpretation of "begin actual construction" is consistent with the regulatory text. Additionally, we support EPA's clarification that the best available control technology (BACT) analysis or other elements of a permitting decision for the emissions unit would not be influenced by site activities that occurred prior to permit issuance.

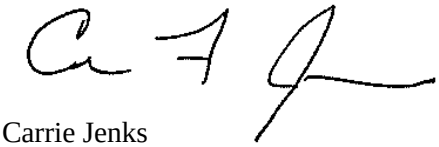
II. The revised interpretation in the draft guidance will lead to regulatory and business certainty without causing an increase in emissions or negative environmental impacts.

The revised interpretation outlined in the draft guidance will provide regulatory certainty as well as business certainty. Construction of generating facilities is a complex and multistage process. Allowing construction activities that are not "on an emissions unit" to begin prior to NSR permit issuance will help streamline construction timelines and allow for staged construction to accommodate seasonal restrictions. For example, the revised interpretation would allow an owner or operator to build a permanent administrative building on site prior to obtaining an NSR permit, as an administration building does not constitute an "emissions unit." Our member companies recognize, as EPA notes in the draft guidance, that if companies undertake on-site construction prior to permit issuance, they would be doing so at their own financial risk. Thus, this draft guidance provides owners and operators with enhanced construction flexibility while maintaining the effectiveness of the NSR permitting program.

As EPA notes, "the revised interpretation set forth in this [draft guidance] is expected to have no emissions consequences…[n]or will it result in any adverse effect on the environment." Owners and operators must continue to obtain the required NSR permits prior to constructing an emissions unit. Thus, we support EPA's draft guidance to interpret "begin actual construction" to increase regulatory and business certainty for owners and operators while maintaining a robust NSR permitting program.

We appreciate the opportunity to comment on this draft guidance memorandum. If you have any questions about these comments, please do not hesitate to contact me at cjenks@mjbradley.com.

Sincerely,



Carrie Jenks
The Clean Energy Group

Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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May 11, 2020

Anne L. Idsal
Principal Deputy Assistant Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 6101A
Washington, DC 20460

Re: Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Dear Principal Deputy Assistant Administrator Isdal:

In the draft guidance *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations* (Draft Published on March 25, 2020), hereafter referred to as the "Begin Actual Construction Guidance Memorandum," the United States Environmental Protection Agency (EPA) is proposing to adopt a revised interpretation of the term "begin actual construction," as that term is defined under EPA regulations implementing the New Source Review (NSR) preconstruction permitting program. EPA's revised interpretation would allow source owners or operators to undertake physical on-site construction activities that may significantly alter the site and be permanent in nature, including activities necessary to accommodate an emissions unit, prior to obtaining a permit. The Connecticut Department of Energy and Environmental Protection (DEEP) respectfully disagrees with such action as adoption of EPA's revised interpretation would lead to inconsistent implementation of the NSR preconstruction permitting program across states and other unintended consequences, including possible increases in transported emissions from upwind states. Such increases could further hinder Connecticut's ability to attain compliance with the ozone National Ambient Air Quality Standards (NAAQS).

The applicable regulations of the NSR preconstruction permitting program dictate that "[n]o [owner or operator of a] new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of [40 CFR Section 52.21] apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements."[1] Where the term "begin actual construction" is defined as "[the] initiation of physical on-site construction activities on an emissions unit which are of a permanent nature."[2]

As stated in the 1995 Seitz Letter and 1978 and 1986 Reich Memorandums, which set forth EPA's interpretation of the term "begin actual construction" until now, certain limited activities,

[1] 40 CFR Section 52.21(a)(2)(iii).
[2] 40 CFR Section 52.21(b)(11).

undertaken at the source owner's or operator's own risk, such as "planning, ordering of equipment and materials, site-clearing, grading, and on-site [temporary] storage of equipment and materials" do not constitute "begin actual construction" and are allowed prior to obtaining a permit.[3] Conversely, "[p]rohibited (permanent and/or preparatory) preconstruction activities . . . would include any construction that is costly, significantly alters the site, and/or [is] permanent in nature."[4] Furthermore, as used in the definition of "begin actual construction," the term "emissions unit" should be construed to "include any installations necessary to accommodate that unit."[5] Consequently, EPA's longstanding policy has been that "[a]ll on-site activities of a permanent nature aimed at completing a Prevention of Significant Deterioration (PSD) source"[6] or "intended to accommodate an emissions unit or which [are] an integral part of the source or modification"[7] are prohibited until a permit is obtained. This provides a bright line test for what an owner or operator may do prior to obtaining a permit.

Under EPA's revised interpretation, a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction on an "emissions unit," as the term is defined in 40 CFR Section 52.21(b)(7). In addition, under this revised interpretation, an "installation necessary to accommodate" the emissions unit at issue is not considered part of that emissions unit, and those construction activities that may involve such "accommodating installations" may be undertaken in advance of the source owner or operator obtaining a NSR permit.[8]

One of EPA's rationales for adopting a revised interpretation of the term "begin actual construction" is that the prior interpretation does not entirely comport with the plain language of the regulatory text because it fails to give meaning to the distinction between "construction on an emissions unit" and "construction on a major stationary source."[9] Yet, EPA states that it is beyond the scope of the memorandum at hand to provide guidance on how the specific parameters of an emissions unit are to be ascertained for purposes of determining whether a particular activity constitutes "construction on an emissions unit" within the meaning of 40 CFR Section 52.21(b)(11).[10] This determination is left up to the discretion of the appropriate permitting authorities. Thus, EPA is proposing to replace a clear and definitive rule of acceptable on-site construction activities with a case-by-case standard. Such a change will result in regulatory uncertainty and inconsistent implementation of the NSR preconstruction permitting program across states. Such an interpretation also burdens state and local air agencies' limited resources, as the agencies take responsibility for making or reviewing these case-by-case determinations.

[3] Begin Actual Construction Guidance Memorandum at 5.
[4] Begin Actual Construction Guidance Memorandum at 10.
[5] Begin Actual Construction Guidance Memorandum at 15.
[6] Begin Actual Construction Guidance Memorandum at 16.
[7] Begin Actual Construction Guidance Memorandum at 9.
[8] Begin Actual Construction Guidance Memorandum at 11.
[9] Begin Actual Construction Guidance Memorandum at 14.
[10] Begin Actual Construction Guidance Memorandum at 20.

EPA also contends that the risk of "equity in the ground"[11] arguments, the second rationale for its prior interpretation, is less of a concern now. EPA explains that state and local permitting authorities now have vast experience implementing the NSR preconstruction permitting program and would not let their permitting decisions be influenced by any "equity in the ground" type arguments, and NSR permit applicants would not undertake significant or costly on-site construction activities prior to permit issuance under the misguided notion that these would help them obtain a favorable permitting decision.[12] Although DEEP agrees that the judgment of local and state permitting authorities would not be compromised by "equity in the ground" type arguments, DEEP believes that allowing significant and permanent on-site construction activities prior to permit issuance would bring unintended and undesirable consequences.

As previously stated, under EPA's revised interpretation, a source owner or operator may, prior to obtaining an NSR permit, undertake construction activities that involve "accommodating installations" since an "installation necessary to accommodate" an emissions unit is not considered part of that emissions unit. However, "secondary emissions,"[13] emissions which would occur as a result of the construction of a major stationary source or major modification that do not come from the major stationary source or major modification itself, such as emissions resulting from "accommodating installations," need to be considered in a PSD analysis. For this reason, allowing source owners or operators to conduct construction activities that would produce secondary emissions prior to permit issuance and the completion of a proper PSD review would be contrary to the goals of the PSD program.[14] Such goals include protecting public health and welfare and ensuring that any applicable permit decision is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision making process.

Additionally, allowing the aforementioned construction activities prior to permit issuance would put into question the credibility and efficacy of the public participation aspect of the NSR preconstruction permitting program. Federal Land Managers (FLMs), among others, are given the opportunity to review and comment on PSD applications and corresponding permits prior to the issuance of the latter. For example, as part of the Regional Haze program, FLMs often comment on the secondary emissions and corresponding controls associated with new major stationary sources or major modifications. Any opposition or concerns raised with respect to secondary emissions resulting from the construction of the proposed source or modification would be difficult or impractical to address when construction activities have already taken place, casting doubt on the importance of the public participation process. Furthermore, allowing a source owner or operator to undertake significant and permanent on-site construction activities prior to issuance of a permit might give the illusion that the new major stationary source or major modification has already been approved, without consideration of public comment. This might give the appearance that permitting authorities are colluding with source owners or operators.

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[11] Where a source owner or operator engages in costly and permanent on-site construction activities prior to receiving an NSR permit with the presumption that in doing so, the owner or operator would gain leverage in the permitting process. Begin Actual Construction Guidance Memorandum at 19.
[12] Begin Actual Construction Guidance Memorandum at 19.
[13] 40 CFR Part 52.21(b)(18).
[14] Https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information.

EPA's revised interpretation would also to an extent, blur the compliance focus of the NSR permitting program from being a preconstruction review program that evaluates a proposed project at the most health- protective and cost-effective time (i.e., prior to construction) with a retrospective assessment of compliance after the damage is done. And while EPA assures that source owners or operators would be aware of the financial risks of moving forward with construction prior to permit approval, EPA fails to mention the risk of a lengthy and contentious permitting process due to the need to reconfigure accommodating installations or reassess applicable regulatory reviews (e.g., NAAQS compliance). These delays in permit issuance would not only affect permit applicants but also put a strain on state and local air agencies' limited resources.

Lastly, EPA mentions that the revised interpretation is intended to be implemented by EPA Regional offices and by those air agencies exercising delegated authority under 40 CFR Section 52.21(u) to issue federal PSD permits. Whereas air agencies with State Implementation Plan (SIP) - approved programs may arguably[15] choose to apply the aforementioned interpretation, if feasible.[16] Irrespective of whether a state chooses or is forced to adopt the proposed guidance, the consequences would remain the same; adoption of EPA's revised interpretation would lead to an increase in emissions from upwind states. As previously explained, EPA's revised interpretation is based on a case-by-case standard that would be inconsistently applied by state and local agencies, as well as bring unintended consequences.[17] As such, EPA's revised interpretation would lead to a relaxation of standards, thereby, weakening states' PSD programs to the extent of causing some increase in upwind emissions and exacerbating the effects of interstate pollution from these states. For states like Connecticut whose location places it in the path of transported emissions, any conceivable increase in emissions from upwind states would not only contravene with previous action taken by DEEP in an effort to address interstate air pollution, but would also hinder Connecticut's ability to attain compliance with the ozone NAAQS.

For the reasons presented, DEEP opposes adoption of the Begin Actual Construction Guidance Memorandum.

Thank you for the opportunity to submit these comments.

Sincerely yours,

Tracy R. Babbidge

Tracy R. Babbidge, Chief
Bureau of Air Management

[15] Some states with SIP-approved programs might be forced to adopt EPA's revised interpretation if nearby states have adopted it, in an effort to maintain a competitive business climate.
[16] Begin Actual Construction Guidance Memorandum at 22.
[17] Allowing significant and permanent on-site construction activities prior to permit issuance would lead to the failure to properly consider secondary emissions in a PSD analysis.

First Name: Eamon
Last Name: Monahan
Organization: Corn Refiners Association
Email address: emonahan@corn.org
Comment:
The Corn Refiners Association (CRA) submits this comment in response to the Environmental Protection Agency's (EPA's) draft guidance Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations. CRA is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners produce sweeteners, ethanol, starch, bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber.

CRA supports EPA's publication of this guidance and the key interpretation that it makes on the definition of "actual construction." Current rules preclude a wide range of preparatory activities, in fact almost any construction activity, from taking place until a new source review (NSR) permit is in place. Such unnecessary delays come at significant cost.
Re-connecting the definition of "construction" to work associated with an actual emissions unit aligns with the text and intent of the NSR permitting rules and comes at no environmental cost.

This draft guidance is a welcome first step toward addressing the onerous permitting processes associated with new facilities in many industries, allowing construction projects to be initiated and completed much faster so American companies can meet consumer demand. CRA looks forward to the opportunity to comment on future guidance and regulation that provides even greater specificity and certainty to American manufacturers.

EARTHJUSTICE
NATURAL RESOURCES DEFENSE COUNCIL
SIERRA CLUB

May 11, 2020

By email: draft_permitting_guidance@epa.gov
New Source Review Group
Mail Drop C504-03
U.S. EPA
Research Triangle Park, NC 27711

RE: Draft Memorandum of March 25, 2020 from Anne L. Idsal to Regional Air Division Directors entitled "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations" ("Draft").

Earthjustice, Natural Resources Defense Council, and Sierra Club have the following comments on the above draft:

1. Rulemaking is required before the Draft can be adopted: The above-referenced Draft would fundamentally change existing requirements governing when construction can begin on a major source project, and therefore cannot be adopted without following the rulemaking procedures specified in 42 U.S.C. §7607(d). The Draft would substantially alter the legally binding restrictions on commencement of construction without the necessity for the preconstruction permit required by the Clean Air Act. There is nothing tentative or advisory about this Draft. It states that EPA "will be applying" it going forward, and EPA acknowledges – as it must – that the new approach dictated therein departs in a major way from agency's regulatory approach of more than 40 years. Accordingly, the Draft would be a legislative rule that cannot be adopted via the informal procedure EPA is pursuing here, and must instead be adopted via the formal procedures in §7607(d).

2. The Draft violates the Clean Air Act: In seeking to limit the requirement for a preconstruction permit to only physical construction on an emission unit in isolation, the Draft violates the Clean Air Act ("the Act"). The Act's PSD provisions bar construction of "a major emitting facility" without a preconstruction permit, not just an emission unit within such a facility. 42 U.S.C. §7475(a). The Act defines "major emitting facility" as any of a number of listed types of stationary sources with the potential to emit 100 tons per year or more of any air pollutant, including a variety of industrial "plants" and "facilities," including (for example) kraft pulp mills, Portland Cement plants, petroleum refineries, phosphate rock processing plants, and "any other source with the potential to emit" 250 tons per year or more of any air pollutant. Id. §7479(a). Likewise, the Act's nonattainment new source review provisions require permits for "the construction and operation of new or modified major stationary sources." Id. §7502(c)(5). None of these provisions limit the permitting requirement to construction of "emission units" or even contain such a phrase. The statute refers to construction of sources and facilities. *See, e.g., Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 308-09 ("It is unlawful to construct or

modify a 'major emitting facility' in 'any area to which [the PSD program] applies' without first obtaining a permit. §§ 7475(a)(1), 7479(2)(C)."). Yet EPA's proposal would let a company spend hundreds of thousands or even millions of dollars constructing a facility without obtaining a permit as long as the work does not include physical construction on an emission unit in isolation.

Nor is term "stationary source," referenced in the above-cited statutes, limited to "emission units." As shown in 42 U.S.C. §7479(a), Congress meant for the term to include "plants" and "facilities," not just individual emission units. The "ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose." *Chevron USA v. NRDC*, 467 U.S. 837, 860 (1984). EPA's own definitions of "source" and "facility" encompasses more than just an individual emission unit:

> (i) Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.
> (ii)(A) Building, structure, facility, or installation means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)

40 CFR §51.165(a)(1)(i) & (ii); 51.166(b)(5) & (6)(i).

Congress was so adamant about not allowing construction to commence before permitting that it provided both civil and criminal penalties specifically for such construction and even for attempting to construct without a permit. 42 U.S.C.§7413(a)(5), (b)(3), (c)(1), (d)(1)(C). Further, 42 U.S.C. §7477 requires the Administrator to take measures "**to prevent the construction or modification of a major emitting facility** which does not conform to the requirements of this part **or which is proposed to be constructed** in any area" designated attainment or unclassifiable and not subject to a SIP that meets the requirements of Part C. Again, this refers to barring construction of the facility, not an emission unit, and to barring "proposed" construction.

The Draft is also based on the false premise that the Act's NSR permit programs are concerned only with ensuring that emissions from an emissions unit meet the Act's air quality and BACT requirements. In reality, the Act requires pre-construction review of not just emission controls and air quality impacts, but also of impacts of construction and location of the facility. For a nonattainment NSR permit, the permitting agency must determine that "**an analysis of alternative sites, sizes, production processes,** and environmental control techniques for such proposed source demonstrates that **benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification**."42 U.S.C.§7503(a)(5)(emphasis added). Thus, in deciding whether to issue a

permit, and if so on what terms, the permitting agency must look at not just the emission unit, but at alternatives sites, and the environmental and social costs imposed due to the source's location and construction, not just its emissions and air quality impacts. The requirement for such analyses would be illegally nullified if the owner could start major construction work at its preferred location before the permitting agency completed its analysis of alternative sites, sizes and processes, and the environmental and social costs imposed as a result of its location and construction. The inclusion of these requirements clearly shows that Congress meant for the permitting process to be completed and the permit issued before construction could be commenced at the applicant's preferred site location.

Likewise, for PSD permits, no major facility may be constructed unless "there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility." Id.§7475(a)(6). The growth referred to here is not growth due to new direct emissions from the proposed facility (which is addressed elsewhere in the statue), but from population and industrial growth in the area that is expected due the increase in jobs, traffic, and economic activity generated by locating a major new source or facility in the area. See, e.g., 40 C.F.R. §51.166(o); EPA, New Source Review Workshop Manual at D.9 (Draft October 1990). The Act also requires EPA to adopt rules for PSD permitting which must require, among other things, "an analysis of the …**terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions** from such facility for each pollutant regulated under this chapter which will be emitted from, **or which results from the construction or operation of, such facility**, **the size and nature of the proposed facility**…and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region." Id. §7475(e)(3)(B)(emphasis added). Further, "[t]he results of such analysis **shall be available at the time of the public hearing on the application for such permit."** Id. §7475(e)(3)(C)(emphasis added).

In other words, Congress required a review of the potential impacts of construction at the facility site itself, and of the size and nature of the proposed facility, and that this information be a subject for the public hearing preceding the permitting decision. The statutory language plainly contemplates that these matters will be reviewed by the permitting authority before a permit is issued. Yet EPA's proposal would unlawfully allow construction to commence at the facility site and for at least a portion of its impacts to already occur before the required analysis has been conducted and subjected to a public hearing.

In sum, EPA cannot, consistent with the Act, allow any construction activity with respect to any part of a source or facility before a preconstruction permit has been issued therefor.

3. EPA cannot ignore Congress' definition of "commenced construction": EPA wrongly asserts that Congress has provided no guidance on what sort of construction can take place before a permit is issued, thus leaving the agency with discretion to make that determination. That assertion is refuted no only by the analysis above, but also by Congress' express definition of "commence construction" under the Act. In 42 U.S.C.§7475(a), Congress directed that "[n]o major emitting facility on which construction is commenced after August 7, 1977, may be

constructed in any area to which this part applies unless" a PSD permit "has been issued" in accordance with Part C of the Act. Section 7479(2) provides in pertinent part as follows:

> (2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.
> (B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

The above provisions speak clearly that Congress prohibited construction to be commenced on a major emitting facility after August 7, 1977 unless a PSD permit has been issued for such facility.[1] Congress further specified that construction is "commenced" for purposes of these provisions if the owner has either "begun, or caused to begin, a continuous program of physical on-site construction of the facility" or entered into binding agreements or contractual obligations to do so. Thus, Congress confirmed that the "construction" prohibited by §7475(a) absent a PSD permit encompassed a program of "**on-site construction of the facility**" - not work limited to an "emission unit". And Congress plainly did not contemplate that construction could commence until all necessary permits and approvals had been obtained.

Contrary to EPA's assertion, nothing in the statutory text limits application of the above-quoted provisions to either the grandfathering of pre-August 7, 1977 sources or to determining when the clock starts for commencing construction after permit issuance. To the contrary, §7475(a) expansively provides that "no" major emitting facility on which construction is commenced after the August 1977 date may be constructed without a permit. EPA's assertion that the statute's prescription that no major facility "may be constructed" in §7475(a) might somehow be read as allowing for some construction at the facility defies the plain meaning of the statute and its purpose. And the definitions in §7479 apply "for purposes of this part"- not just for purposes of the two programs cited by EPA.

4. The rule defining "being actual construction" does not support EPA's reading

EPA's proposed interpretation of "being actual construction" is not only contrary to the Act, but contrary the language of the rule on which EPA relies. The text of that definitional rule is as follows:

> The term "begin actual construction" is defined to mean "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations,

[1] To be clear, the Act bars not only the commencement of construction without a permit, but also continuation of construction thereafter without a permit.

laying underground pipework and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change." 40 CFR § 52.21(b)(11).

EPA asserts that the plain language of this rule, an owner or operator may, prior to obtaining an NSR permit, undertake costly on-site activities that may significantly alter the site and/or are permanent in nature provided that those activities do not constitute "physical construction on an emission unit." But the rule does not so limit the meaning of "begin actual construction." EPA completely ignores the phrase "in general" in the definition. That introductory term connotes that what follows is meant to be an illustrative or imprecise description of the matter at issue. Webster's Online defines "in general" to mean "for the most part: generally," and in turn defines "generally" as " in disregard of specific instances" and "with regard to an overall picture generally speaking; "usually." In other words, what follows "in general" is not meant to precisely define every instance meant to be covered. Thus, EPA's attempt to rigidly read "on an emission unit" as a term of absolute exclusion is simply not consistent with the text.

EPA's reading is even more flawed in light of the sentence that follows: "Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." EPA struggles to find a way to read this sentence as excluding performance of the specified activities anywhere except "on an emission unit." That attempt defies the actual language of rule. First, it wrongly assumes the prior sentence strictly limits the construction encompassed by the rule to work done "on an emission unit," when it does not for the reasons stated above. Second, The second sentence does not in any way exclude any type of construction work, but rather by its own terms only lists some types of work that the rule "includes" – a term that by definition is not one of limitation, but rather one that means what follows is part of a larger group, not exclusive. Third, at least two of the activities described in the second sentence simply do not fit with EPA's imagined limitation. For example, "installation of building … foundations" cannot be referring to work on a single emission unit because it refers to foundation**s** (plural). Likewise, EPA's claim that "construction of permanent storage structures" is limited to such structures that are themselves emission units makes no sense, as it renders the phrase a pointless redundancy: The first sentence already explicitly includes the emission unit itself. These two examples show that rule plainly includes the start of work on structures in addition to the emission unit as encompassed within "begin actual construction."[2]

5. EPA fails to provide a reasoned explanation for departing from the agency's longstanding interpretation: EPA concedes that its proposed Draft conflicts sharply with its own 40-yearlong construction of the rules at issue. Two of the relevant interpretative memos – the 1978 and 1986 Reich memos – were issued very close in time to the rule's adoption, and

[2] EPA's reading on its rules also leads to an arbitrary inconsistency between its treatment of the construction activities that constitute "actual construction" for which an NSR permit is required (i.e., only physical construction on an emission unit) and those that constitute commencement of "actual construction" after permit issuance sufficient to avoid lapse of an issued permit (encompassing a wide range of activities not limited to the emission unit). See 40 C.F.R. §52.21(b)(9)(i) and 52.21(r).

therefore reflect the agency's contemporaneous view of their meaning. EPA has cited no facts indicating that some fundamental change over the past 40 years justifies reopening the matter. The agency asserts that a number of regulated parties have asked for a change but fails to identify any such parties or specific facts presented by them that would justify such a major change. EPA notes that the current limits on onsite construction prior to permitting were based in part on the importance of avoiding the biasing of permitting decisions where the applicant has already invested large sums in site construction as of the time of the decision to grant or deny the permit. Contrary to EPA's assertion, that compelling rationale has not been undermined by the mere fact that permitting authorities have been issuing NSR permits for more than 40 years. The concerns about creating equity arguments in favor of permit issuance and biasing permit decisions were and are based on common sense assessments of human nature and political realities and have nothing to do with how many years an agency may have been issuing permits. Indeed, Congress itself shared these concerns. In defining "commenced" as applied to construction of a major source, Congress said it would be enough to treat construction as "commenced" if (in addition to obtaining all necessary permits and approvals) the owner or operator entered into binding agreements or contracts "which cannot be canceled or modified **without substantial loss to the owner or operator**." 42 U.S.C.§7479(2)(A)(emphasis added). In order words, Congress did not want to let applicants commit large sums of money to construction of a major source without having secured a permit. Moreover, EPA's existing policy was not based solely on these concerns, but also on effectuating the statutory requirement for issuance of a permit before construction.

Nor can EPA justify its proposed approach based on its speculation that an owner's substantial investment in pre-permit site construction would somehow lead the owner to agree to more stringent permit terms. EPA offers no evidence to suggest this is a plausible scenario, and in any event, it wrongly presupposes that development of permit terms should be a negotiation rather than an independent determination by the permitting authority as to permit terms necessary to comply with the statute and regulations. The statute and EPA's rules confer upon EPA and states with approved NSR programs the ultimate decision on permit terms.

EPA also ignores another basis for its historic interpretation – namely, that allowing owners to put substantial equity in the ground would prejudice the ability of EPA and citizens to challenge the permit that is eventually issued. See., e.g., 61 FR 38270. Likewise, allowing significant investment before permitting would undermine the ability of EPA and citizens to secure injunctive relief against unlawful construction of major sources. In deciding whether to issue injunctive relief, courts look at the equities, and an owner who has already expended large sums on source construction at the time of permit issuance will likely argue that those costs are a major equity weighing against enjoining their project. That is an argument an owner would not have under the current policy.

6. EPA has not shown how the "begin actual construction" definition applies to allowing pre-permit construction under nonattainment new source review: EPA asserts that the "begin actual construction" test defines allowable pre-permit construction activities both for PSD and nonattainment NSR permit applicants. However, the CFR sections EPA cites include the "begin actual construction" test only as a trigger for PSD permitting, not nonattainment NSR. Even if EPA's Draft were lawful and rational, which it is not, the Draft cannot direct use of its

new “begin actual” test to authorize construction to commence at sites for proposed major sources that require nonattainment NSR permits unless EPA can cite specific regulatory language specifying use of that test for nonattainment NSR permitting.

7. The Draft policy violates antibacksliding restrictions: The Act and EPA rules prohibit EPA and states from relaxing controls after a NAAQS revision, and it is well established that nonattainment NSR is a “control” for this purpose. The Draft would significantly weaken requirements of the nonattainment NSR program by allowing new major and modified sources to begin major construction that is currently forbidden without the owner or operator having met all of the Act’s stringent requirements for obtaining a preconstruction permit as set forth in 42 U.S.C. §7503 and EPA’s rules. The result will be weaker health and environment protections for reasons set forth in preceding paragraphs of these comments. In addition, the Draft will allow proposed sources to delay: a) the showing required by 42 U.S.C. §7503(a)(3) that all major stationary sources owned or operated by the proposed source’s owner or operator in the State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards; and b) a determination by the permitting agency that the Administrator has not determined that the SIP is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified. The effect will be to delay the incentive and remedial benefit of these provisions in prompting the proposed source’s owner to ensure its other major sources are subject to emission limits and in compliance therewith, and in prompting the state and/or local agencies to correct any inadequate implementation of the SIP in the nonattainment area.

8. States cannot adopt or implement the major change proposed in the Draft without revising their SIPs: Over the past 40 years, EPA has approved SIPs with an understanding of the Act, EPA's own regulations and state program regulations squarely at odds with the new interpretations reflected in the draft guidance. Similarly, EPA delegated NSR program authority to states consistent with an understanding of the federal NSR regulations also utterly inconsistent with the draft guidance interpretations. In both cases, SIP attainment demonstrations and maintenance plans were based upon the more stringent understandings reflected in the 40 years of regulatory guidance and rules that pre-date this Draft guidance.

Accordingly, even if the Draft were lawful (which it is not), EPA could not simply declare by guidance document that states and localities may be able to apply the new policy by relying on their existing SIP language (as EPA suggests on page 22 of the Draft). EPA could not have lawfully approved a SIP that authorized or applied the approach in proposed guidance because that approach is flatly contrary to the law as construed by EPA for more than 40 years. Those jurisdictions have been operating and continue to operate under "begin actual construction” practices more rigorous than, and inconsistent with, the guidance. State and local jurisdictions could alter their longstanding practices only by undertaking new SIP revisions that are subjected to public notice and hearing as required by the Act along with a showing that the revisions will meet all applicable requirements of the Act. *See* 42 U.S.C. §7410(k), (l).

Sincerely,

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Flexible Packaging Association

May 11, 2020

Via Electronic Mail
draft_permitting_guidance@epa.gov
U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 22771
Attn: Mathias.Scott@epa.gov;

RE: **EPA Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations (Mar. 25, 2020)**

Dear Mr. Mathias:

Introduction – The Flexible Packaging Association (FPA) appreciates this opportunity to submit comments on the EPA's draft NSR Guidance interpreting the regulatory definition of "begin actual construction." This term is pivotal to the regulated community because it determines what construction activities can be done to prepare a site for major new emitting unit or major modification of an emitting unit under the Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NNSR) programs (hereafter referred to "NSR"). FPA is appreciative of EPA's attention to the issue, and supports the agency's guidance. Regulatory certainty is important for businesses, and this issue has become so difficult to navigate because of the many layered analysis of issues like "cost" and "permanence" it has been given in recent years, which FPA would argue have nothing to do with obtaining NSR permits for emitting units. FPA welcomes the straightforward approach of the Draft Guidance. We also believe that it is legally defensible because it would not allow any NSR-regulated emissions to result from a new project, until the owner or operator of an NSR-regulated major source receives an NSR permit.

The FPA was established in 1950 and is a national trade association comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials. Examples of flexible packaging include roll stock, bags, pouches, labels, liners, wraps, and tamper-evident packaging for food and medicine. Flexible packaging, a $31 billion industry, employs approximately 79,000 people in the United States and is now the second largest segment of the U.S. packaging market estimated at $162 billion.

Clarity on the Definition of Begin Actual Construction is Needed – This Guidance should be finalized as soon as possible because businesses need this advice. They can shoulder the business risk of undertaken preparatory activities on non-emitting installations that will accommodate an emitting unit, if they ultimately do not receive an NSR permit.

FPA agrees with early EPA legal interpretation, analyzed in the Draft Guidance, that Congress did not give particular attention to the types of preparatory work that the owner or operator of a regulated Clean Air Act "source" could undertake at an NSR-permit applicant's own risk before an NSR permit is issued.[1] We suspect that is because the drafters of the Act did not mean to regulate such activities. Thus, in that 1978 Guidance, EPA also appears to have allowed activities that did not emit not to require a PSD permit.[2] But in the decades between the 1978/1980 NSR regulations when the definition of "begin actual construction" first appeared, the agency has taken many expansive and unwarranted interpretations of that definition that essentially banned most preparatory activities on non-emitting units, including but not limited to buildings that would accommodate an emitting unit, if they deemed them to be permanent, costly, involved holes in the ground, or could create leverage over federal and/or local permitting authorities.[3] By doing so, the agency has encroached on businesses' willingness to take financial risks in investments on activities that have nothing to do with environmental harms that the Clean Air Act was meant to protect.

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[1] E. Reich, Dir., Stationary Source Compliance Division (SSCD), "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of PSD Permit" (Dec. 18, 1978) (EPA concluded in 1978, that the Clean Air Act and its legislative history did not discuss this issue and thus, "we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit.")

[2] Id. the 1978 Reich guidance, appears to indicate that whether or not a building or structure that will house emissions units may be constructed before a permit is issued depends on the whether those emissions units will be subject to PSD.

[3] See, e.g., J. Sietz to C. Williams (Dec. 13, 1995) ("All on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.")

[4] Control Techniques for Flexible Packaging Printing, EPA 453/R-06-003, September 2006

FPA supports EPA's revised interpretation in the Draft Guidance of "begin actual construction," as defined in 40 CFR 52.21(b)(11), to mean that "a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction on an "emissions unit," as the term is defined in 40 CFR § 52.21(b)(7). We agree with the agency's position that an "'installation necessary to accommodate' the emissions unit" should not be considered part of that emissions unit, and that construction activities that involve an "accommodating installation" can be undertaken in advance of the source owner or operator obtaining an NSR permit.'[4]

The Five Criteria Listed in the Draft Guidance Provide Additional Clarity and Should be Retained in the Final Guidance. The Draft Guidance, at page 13, sets forth five distinct criteria that, collectively, identify the type of activity that a source owner or operator is precluded from undertaking prior to obtaining an NSR permit – i.e., activity (1) that is "physical" in nature; (2) that is undertaken "on-site"; (3) that involves "construction"; (4) that is "on an emissions unit"; and (5) that is of a "permanent nature." FPA agrees that this list of criteria accurately describe the type of activity that require receipt of an NSR permit and constitute the "beginning" of "actual construction.

Flexible Packaging Facilities – For those who have not visited a flexible packaging facility, a description and diagrams of the flexographic and rotogravure printing processes can be found in the 2006 revised Control Techniques for Flexible Packaging Printing[4] and the 2007 revised control technique guideline for the industry.[5] Very briefly, these manufacturing converting plants consist of one or several large buildings in which very large presses, with multiple stations, convert a paper or film web for food, beverage, and other consumer products and medical packaging. These buildings often house several presses and laminators, the latter which fuse materials to create packaging, and/or packaging seals, etc. Emitting activities include direct and fugitive emissions from dryers on individual printing stations, coating and ink mixing rooms, and cleaning operations. Emissions from these operations are vented from a building to a thermal or catalytic oxidizer, utilizing negative pressure and/or in some instances, a Reference Method 24 Permanent Total Enclosure.

FPA recognizes the agency's reluctance to offer in Guidance, when it is finalized, specific applicability determinations, and we also recognize that EPA's Guidance, when final may not be adopted by States with their own NSR programs. Nevertheless, we would welcome any general guidance, if the agency wishes to offer it, on our flexible packaging plants.

[4] Draft Guidance at pages 2-3.

As described in the definition of "begin actual construction," it appears to FPA members that the building that accommodates presses is not the emitting unit, and the foundation of the building, its peripheral electrical conduits, and other utilities like lighting are also not emitting units. Also, unless an oxidizer must be modified to accommodate a new press, it also appears that new conduits to the oxidizer can be constructed in readiness for a permitted emitting unit, so long as the emitting unit itself is neither installed or constructed. Thus, in the case of an owner or operator that has applied for an NSR permit to construct a major source, a new building or foundation and supporting peripherals could be assembled before the NSR permit is received, at the owner or operator's own risk, because none of the aforementioned activities meet criteria "4," above, in the definition of begin actual construction "on an emissions unit."

Case-by-case determinations should not be required even though they can provide additional assurance for compliance and environmental protection. FPA agrees with the 1978 agency guidance cited by the Draft Guidance in footnote 33, "While ease of administration and a desire to avoid case-specific determinations are themselves laudable goals, the Agency must also interpret and apply its rules in a manner that it consistent with the plain text of those rules." FPA submits, however, that the Final Guidance should *not* require a facility to obtain a case-by-case determination, because facilities and permit authorities can follow the five-point criteria outlined in the Draft Guidance on implementing the definition of "begin actual construction" (as well as other relevant Clean Air Act requirements such as applicable NSPS and NESHAPs requirements). An owner or an operator should be allowed to accept all risk and potential liability associated with the possible denial of the permit application. In fact, manufacturers already accept substantial risk associated with the possible denial of the permit application by purchasing manufacturing equipment prior to a permit application being considered by the Agency, because the lead time for process equipment design, construction, and procurement, frequently takes more than 12-months after a contract is entered. Thus, FPA believes that the Final Guidance should not require case-by-case determinations when it is issued, because an owner or operator of a source for which a permit application can be submitted, can rely on the definition of "begin actual construction" that is articulated and accept the business risk, and potential liability associated with the possible denial of the permit application.

Additional Clarity or Confirmation on the Discussion in the Guidance on the Meaning of "Part" of a Stationary Source Would be Helpful in the Final Guidance. EPA discusses at length the distinction between a "part" of an emissions unit and a "part of a stationary source" throughout the Draft Guidance, but especially on pages 15-16. On page 16, Draft Guidance states:

> EPA has effectively construed the phrase "that emits or would have the potential to emit" to modify the term "stationary source" rather than the word "part." The noun in this part of the sentence, however, is best understood to be a "part of a stationary source." The term "stationary source" is separately defined in the PSD regulations as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." 40 CFR 52.21(b)(5). Thus, within the definition of "emissions unit," the phase "emits or would have the potential to emit" is not needed to give meaning to the term "stationary source." Accordingly, the most sensible reading is that an emissions unit is the "part" of a stationary source "that emits."

This analysis is somewhat confusing. FPA's interprets the analysis to mean that the EPA is making a distinction between "which/that emits" and "would have the potential to emit." In following the preceding discussion on the definition "begin actual construction," where the facility must meet all five of the criteria in the definition, we understand that if the "part" of the stationary source and/ or the emitting unit" that does not meet those criteria, can be constructed or installed without an NSR permit. For example, it appears that the following activities would be allowed:

1. **Installing footings for the emission unit**
2. **Installing utilities for the process (i.e. electrical feeds, etc.)**
3. **Installing ductwork for the process**

All the above are "part of the source," but they do not meet "criteria 4" of the definition of "begin actual construction ('that is on an emissions unit')." FPA seeks clarification that these activities would be allowed because they are a "part" of the source that itself "does not emit or have the potential to emit." In other words, they are part of the installation that will accommodate the "emitting unit," when an NSR permit is received.

Guidance to States – As the agency is aware, many states that administer major (and minor NSR permitting programs, pursuant to either federal delegations or individual SIP-approved NSR regulations, also have their own guidance on the definition of prohibited pre-permit activities interpreting "begin actual construction." FPA urges EPA to consider adding text to the Draft Guidance that encourages these state and local permit authorities to recast their own interpretations, since most of these were based on the past federal guidance.

Conclusion - Finalizing this Draft Guidance is of the utmost importance to FPA and its members. In our view, it is one of the most important NSR activities that the agency has undertaken in the past decade. Delays in construction occasioned by the prior expansive

and uneven interpretations of the regulatory definition of "begin actual construction" harm businesses, their surrounding communities, and work forces. Delays also can disrupt related community-planning related to new infrastructure to accommodate expanded economic opportunities for a business. Above all, construction of preparatory buildings and other facilities to accommodate an emitting unit, once permitted, do no harm to the environment. They are an acceptable business risk.

FPA appreciates having this opportunity to comment on the Draft Guidance and urges the Agency to finalize it as soon as possible. If you have questions for FPA, or its members, or would like to discuss our comments or suggestions, please feel free to contact me.

Sincerely,

Ram Singhal,
Vice President Technology & Environmental Strategy
Flexible Packaging Association

GEORGIA
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May 1, 2020

Submitted electronically to:draft_permitting_guidance@epa.gov

New Source Review Group
Mail Drop C504-03
U.S. EPA
Research Triangle Park, NC 27711

RE: Comments on March 25, 2020 Memo - Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Georgia Environmental Protection Division – Air Protection Branch ("Georgia") appreciates the opportunity to review and comment on US EPA's latest draft NSR permitting guidance.

Background

Georgia operates a PSD/NSR permitting program as part of an approved SIP. Georgia's PSD and nonattainment NSR permitting program largely adopt 40 CFR 52.21 and 40 CFR 51.65 by reference – with some changes based on Georgia's regulatory needs. While our program is SIP approved and thus we have "ownership" over permitting issues, Georgia generally follows US EPA guidance on regulatory, permitting, and modeling issues. Georgia issues minor source permits as well as PSD major permits. In both cases, these permits serve as both "construction" and "operation" permits, unless and until a Title V permit is issued (usually at least 24 months after initial startup).

Georgia Comments

Georgia generally supports the March 25 guidance, as the draft guidance very closely resembles the interpretation Georgia makes for pre-permit activities for minor source permitting. Georgia rules do not specifically identify what activities can and cannot occur prior to construction permit issuance.

EPA's March 25 draft guidance will make expectations and enforcement much more consistent across both levels of air permitting in Georgia. In general, Georgia allows construction of non emissions-generating structures prior to issuance of a minor source permit. This has typically included allowing building foundations, walls, roads, and other items that are not emission units. Georgia allows for emission units to be delivered to the site, but not installed, prior to permitting. As in EPA's guidance, permit applicants that choose to undertake on-site construction activities in advance of permit issuance do so at their own risk.

Georgia agrees with EPA that the past interpretations were very stringent, potentially over-reaching, given the focus on "emission unit" in the definition provided in 40 CFR 52.21.

Georgia agrees that this guidance will not result in applicants gaining leverage in the permit application review process. In fact, allowing some site construction will reduce the urgency put on permitting agencies to issue PSD permits in a very short timeframe.

Again, Georgia appreciates the opportunity to review and comment on this draft document, and Georgia applauds EPA's recent efforts to clarify various confusing issues that existed regarding PSD/NSR permitting.

If you need any other information, please feel free to reach out to me via email at karen.hays@dnr.ga.gov, or via phone at 404.363.7014.

Sincerely,

Karen Hays

Karen Hays, PE
Chief
Air Protection Branch

Cc: Anne L. Idsal, Principal Deputy Assistant Administrator
Juan Santiago, Associate Division Director of the Air Quality Policy Division, Office of Air Quality Planning and Standards

May 11, 2020

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Principal Deputy Assistant Administrator
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Re: Comments on Draft Memorandum, "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations"

Dear Ms. Isdal:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments to the U.S. Environmental Protection Agency ("EPA") in response to its request for comments on the March 25, 2020 Draft Memorandum, "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations" ("Draft Memo").

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream strongly supports the Draft Memo's proposed interpretation of "begin actual construction." EPA's existing interpretation, dating back to 1978, fails to distinguish between the regulations' differing definitions of a "major stationary source" and an "emissions unit" and is based on regulatory language that has since been revised. Although the proposed interpretation is not the only possible one, it is clearly the best interpretation that provides meaning to all of the relevant regulatory terms. Further, the existing interpretation erroneously predicted that a project developer's sunk costs in pre-permit construction activities would be a major factor in a permitting authority's decision to issue or deny a New Source Review ("NSR") or Prevention of Significant Deterioration ("PSD") permit. As decades of experience has demonstrated, that prediction never came true. The proposed interpretation, if finalized, would provide significant flexibility to project construction schedules that can be unnecessarily delayed under EPA's current interpretation without any increase in emissions.

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I. EPA's Proposed Legal Interpretation Correctly Distinguishes Between a "Major Stationary Source" and an "Emission Unit" Within that Source

GPA Midstream supports EPA's proposed interpretation of "begin actual construction" because it is consistent with the term's regulatory definition and properly recognizes the distinction the regulations draw between a "major stationary source" and an "emissions unit."

Foremost, as EPA reasons, the proposed interpretation follows from the plain regulatory text. The core requirements of the PSD rules "apply to the *construction* of any new major stationary source or the major modification of any existing major stationary source…" 40 C.F.R. § 52.21(a)(2)(ii) (emphasis added). Moreover, the central prohibition in EPA's PSD regulation is that a "new major stationary source or major modification" to a source shall not "*begin actual construction* without a permit …." 40 C.F.R. § 52.21(a)(2)(iii) (emphasis added). To guide this process, the rules then define the phrase "begin actual construction," which requires a multi-part series of actions to be satisfied: the (1) "initiation of physical on-site construction activities [2] *on an emissions unit* [3] which are of a permanent nature." *Id.* § 52.21(b)(11) (emphasis added). An "emissions unit," in turn, is defined as "any part of a stationary source that emits or would have the potential to emit a regulated NSR pollutant…." *Id.* § 52.21(b)(7). Thus, under the plain terms of the regulation, an owner or operator does not "begin actual construction" at a "major stationary source" until it initiates physical on-site construction "on an emissions unit," the "part" of a source that actually emits pollutants, not the other structures, facilities, or appurtenances at the source that do not. EPA's proposal sensibly follows this clear regulatory framework.

EPA's proposed interpretation is further bolstered by how it defines "construction" for purposes of PSD. Under the rules, EPA defines "construction" to mean "any physical change … (including fabrication, erection, installation, demolition of an emissions unit) that would *result in a change in emissions*." 40 C.F.R. § 52.21(b)(8) (emphasis added). Hence, by definition, for work to be "construction" the activity must itself be an action that would result in a change in emissions.

As such, it makes perfect sense to interpret "begin actual *construction*" as the physical change to the actual emissions unit itself. As an example, installing a concrete pad for a compressor station is not the "construction" of an "emissions unit," as it will not "result in a change in emissions" absent actual installation of the compressor station itself. This is the most straight-forward reading of the current regulations and consistent with the Clean Air Act's aim of regulating pollutants from emissions units, not other components of industrial sites which have no emissions.

Moreover, the proposed interpretation reflects how EPA regulations *currently* define construction. This definition has changed since EPA's original PSD rules in 1978, where "construction" was defined "in the regulations as 'fabrication, erection, installation, or modification of a *source*.' 40 C.F.R. 52.21(b)(7), 43 FR 26404." Memorandum from Edward E. Reich, "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit" at 1 (Dec. 18, 1978) (emphasis added). EPA's interpretative guidance on "begin

actual construction" has not changed with the revised definition of "construction" and is, therefore, outdated[1]

Further, an interpretation that a permit is required before work begins on the actual emissions unit would render the phrase "begin actual construction" superfluous. There would be little point to § 52.21(b)(11) being so specific – directing that to "begin actual construction" only pertains to "physical on-site construction activities on *an emissions unit*" – if activities on other aspects of the source were interpreted as requiring a permit. The regulation does go on to provide examples of prohibited construction activities to include "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." However, EPA properly proposes to read those as limited to activities of that type that are in fact "on an emissions unit," as the regulation actually reads. When interpreting "administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided." *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

In sum, allowing construction activities that are not directly on the emission unit itself gives proper effect to the distinction between a "major stationary source" and an "emission unit."

II. Sunk Costs are not a Factor Considered in NSR/ PSD Permitting

In the Draft Memo, EPA has also prudently proposed to reconsider the original rationale for broad prohibitions on pre-permit construction activities. Over 40 years ago, EPA had justified its interpretation, in part, on the proposition that it would be "extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle. Therefore, in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than to have a 'white elephant' on our hands later on." Memorandum from Edward E. Reich to Thomas W. Devine, "Source Construction Prior to Issuance of PSD Permit" (Oct. 10, 1978) at 2. This reasoning is no longer valid, if it was ever valid.

Today, for a particular project, the key questions involve whether a project is a physical change that results in a significant net emissions increase – and if so, what Best Available Control Technology ("BACT") emission limits may be appropriate. However, at the time of Mr. Reich's 1978 memorandum, the statutory definition of BACT, found at 42 U.S.C. § 7479(3), had been added to the Clean Air Act only the year before, Pub. L. No. 95-95, 91 Stat. 685, 741 (Aug. 7, 1977), and the Agency (and state permitting agencies) had little or no experience with it. Under EPA's 1975 regulations, BACT was equivalent to New Source Performance Standards and a case-by-case determination was only performed where no New Source Performance Standard existed. 40 C.F.R. §§ 52.01(f), 52.21(d)(2)(ii) (1975). At the time of Mr. Reich's 1978 memorandum, EPA believed that implementing BACT "could impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities." *Alabama Power Co. v. Costle*,

[1] It should be noted that the Clean Air Act defines the word "construction" as "when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility." This definition is ambiguous in the sense that it does not draw any line between what type of construction activities may or may not be commenced prior to securing an NSR or PSD permit.

636 F.3d 323, 405 (D.C. Cir. 1979). That created uncertainty about whether a project would proceed.

At this juncture, determining BACT is a much more well-established process. In 1990, EPA issued a draft guidance which formalized the five-step BACT process, which has served as the framework for PSD review of emissions limitations. *See* EPA, Draft New Source Review Workshop Manual (Oct. 1990) ("1990 Draft Manual"). In this guidance, EPA established a policy that sunk costs, such as construction already undertaken before the regulator issues a permit, were not part of the "economic impacts and other costs" criterion of a BACT review under the CAA. 42 U.S.C. § 7479(3). Instead, the 1990 Draft Manual advised that EPA and other permitting authorities should only consider the total annualized costs, cost effectiveness, and incremental cost effectiveness of the pollution controls themselves. 1990 Draft Manual at B.25. Therefore, the concern that a regulator would grant a permit it would otherwise deny, or alter the stringency of BACT emissions limits, based on an applicant's sunk costs at a site has never been justified.

Even if sunk costs were considered, EPA permitted applicants to expend significant resources on a proposed project prior to the receipt of a permit so long as they were part of an arbitrarily selected class of expenses. In a subsequent memo by Mr. Reich, EPA explained that, while the "installation of building supports and foundations, paving, [and] laying of underground pipe work" were all too costly to allow prior to obtaining a permit, the owner or operator was still permitted to undertake "planning, ordering of equipment and materials" and "on-site storage of equipment and materials." Memorandum from Edward E. Reich, "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit" (Dec. 18, 1978) at 2; *see also* Letter from John S. Seitz, EPA OAQPS, to Charles W. Williams, Minnesota Pollution Control Agency (Dec. 13, 1995) ("Seitz Memo") at 1 (permitting "entering into binding agreements or contractual obligations" prior to obtaining a permit). The costs of designing and engineering a major stationary source ("planning"), entering into binding contractual agreements, and ordering and taking delivery of equipment for that source can commit an owner operator to many millions of dollars in costs. These costs will often dwarf those involved in laying foundations, paving, or installing underground pipe. Yet, to the extent that EPA's fear of sunk costs was ever valid, to allow developers to incur certain classes of high-cost expenses but not other relatively low-cost expenses was an arbitrary line that is not defensible. EPA's proposal to eliminate it is sound.

III. The Proposed Interpretation Would Provide a Significant Benefit to Project Developers – Without Resulting in an Increase in Emissions

The proposed interpretation is sound policy because it would provide project developers with significant flexibility to schedule construction and minimize unnecessary delays – without resulting in any increase in emissions. Delays in ultimately receiving a permit can cause significant disruption to construction plans and schedules. Allowing site construction activities unrelated to the emissions unit itself (provided that the developer has other necessary permits and approvals for construction) provides significant flexibility to manage project work. For example, developers may have seasonal limitations on certain construction activities as a result of the potential presence of endangered or threatened species during certain times of the year or due to weather. EPA's historic policy had not allowed developers to schedule work around those limitations while awaiting a final permit decision. *See* Seitz Memo at 3 (denying that "there is flexibility … to allow construction of footings for emissions units without a PSD permit in cold weather States such as

Minnesota."). Allowing them the flexibility to undertake a wide range of construction activities that are not on the emissions unit itself can avoid months of delays, even where a permit is processed relatively quickly.

With regard to both equipment order lead times and mobilization of contractors, the inability to "begin actual construction" until a permit is issued brings about challenges that can delay aspects of the project that have nothing to do with emission units well past the time that the permit is issued. Having the ability to conduct activities like building foundations, installing electrical systems, and laying piping, none of which constitutes "construction on an emissions unit," allows projects to move forward without having a negative impact on the environment. The strict current interpretation on start of construction prolongs the uncertainty around permit issuance primarily based on scheduling. Delays in project construction result in unanticipated costs as construction contractors are mobilized and then forced to stand down once it becomes clear permit approval will take longer than expected. The company must incur further costs to re-mobilize construction contractors once it believes permit approval is imminent. Finally, delays in permit approval cause companies to incur additional costs when they are unable to set large process equipment at the facility location and must, instead, pay for the equipment to be transported and stored at a separate location pending permit approval.

Once winter arrives in the northern states (*e.g.*, North Dakota and Wyoming), the ability to excavate, trench and pour foundations becomes virtually impossible in the frozen ground. By having the ability to perform this work in the fall prior to freezing temperatures, companies can take advantage of limited windows of time to complete necessary preparatory work pending permit approval. In addition, counties in northern states issue "frost laws" which, due to melting ice or snow, restrict the size of vehicles that can travel on county roads. Because many facilities are located on unpaved county roads, the annual implementation of frost laws impairs the ability of a company to deliver heavy equipment to its sites. By allowing companies – prior to permit approval – to deliver equipment to a pad but not connect it in a way that would allow it to be considered an emission source, EPA will give companies the flexibility they need to more effectively manage the combination of harsh winter weather and frost law-imposed restrictions in northern states.

Lastly, with respect to some midstream facilities, delaying construction activities can increase emissions. For instance, the construction of pipeline tie-ins requires the shutdown of a large portion of a facility, if not the entire facility. Typically, tie-in construction is coordinated with a planned facility shut down for maintenance and repair activities. When permitting is delayed, however, and the tie-ins cannot be made, the developer postpone the shutdown. This not only delays construction, but the repair or replacement of leaking components subject to the Leak Detection and Repair Program. Where two shut downs are required to separately address tie-in construction and maintenance, this unnecessarily doubles startup and shutdown emissions. Allowing flexibility for the construction of tie-ins, which are not emission sources themselves, prior to permit issuance will give developers the flexibility to complete work without unnecessary shutdown and startup emissions.

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GPA Midstream appreciates the opportunity to submit these comments in response to EPA's proposed guidance document and is standing by to answer any questions that the agency may have.

Respectfully submitted,

Matt Hite

Vice President of Government Affairs
GPA Midstream Association

Illinois Environmental Regulatory Group
An Affiliate of the Illinois Chamber of Commerce

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May 11, 2020

Mr. Andrew R. Wheeler
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Submitted electronically via www.epa.gov

RE: Comments for Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Dear Administrator Wheeler:

The Illinois Environmental Regulatory Group ("IERG") is a not-for-profit trade association of 46 member companies in a variety of major industries located throughout the State of Illinois, that are impacted by the United States Environmental Protection Agency's ("EPA") Prevention of Significant Deterioration ("PSD") permitting regulations, including implementation of interpretations addressed in this matter. IERG represents the interests of its members in environmental regulatory development in the State of Illinois with an emphasis on state rulemaking but also including, from time to time, federal actions which directly impact the State of Illinois and its members.

In accordance with EPA's request for comments contained on its website (March 25, 2020), IERG respectfully submits its comments for your consideration. As described in more detail below, IERG supports EPA's Draft Guidance on its interpretation of "Begin Actual Construction" and provides additional comments to further detail IERG's support of the draft guidance.

Preparatory Activities

Under current interpretation of the regulatory definition, EPA considers almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of "actual construction" even where the activity does not involve construction on an emissions unit. The revised interpretation contained in this guidance will allow a source owner or operator to undertake physical on-site activities provided those activities do not constitute physical construction on an emissions unit.

IERG supports EPA revising its interpretation as this clarifies activities, such as foundation and site preparation which are not part of an emissions unit, may proceed in advance of permit issuance. This clarification enables sources to avoid extreme weather conditions and costly

delays due to weather in planning for the installation of the actual emission units upon issuance of the final permit.

"Emissions Unit"

While IERG supports the revised interpretation, IERG believes that further guidance on the definition of "emissions unit" is warranted in order for the revised interpretation to be as effective as possible. A lack of additional guidance on this topic leaves the door open to decisions by a permitting authority that would render the revised interpretation meaningless. Further, there is concern that various permitting authorities will be inconsistent with their interpretation of what constitutes an "emissions unit" and, as a result, industries will be treated differently across the country.

Per 40 CFR 52.21(b)(7), an emissions unit is "part of a stationary source." In the draft guidance, EPA warns permitting authorities against invoking an overreaching definition of an "emissions unit." However, when describing the interconnectedness approach, EPA implies that a permitting authority may designate a group of individual air emission sources as "the emissions unit" if the new or modified emission source for which a permit will be sought has "interconnectedness" by piping with other sources. Reliance on an interconnectedness approach can lead to situations at a large integrated facility where preparatory activities for installing or modifying an emission source (such as a heater, boiler, or sulfur recovery unit) can never occur pre-issuance of the permit because the emissions unit has been defined by the permitting authority as the entire process area or even the entire site. In these situations, all preparatory activities on the site could be considered to constitute construction of the emissions unit.

Flexibility for Tie-in

The new interpretation provides flexibility for a tie-in activity by recognizing this activity does not constitute beginning actual construction on a possible future project. Allowing sources to utilize opportunities during planned shutdowns to install tie-ins is beneficial for various industry types.

Conclusion

For the reasons articulated above, IERG encourages EPA to finalize its revised interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations. However, IERG requests that the final guidance include additional detail and examples that clarify the definition of "emission unit" to avoid confusion and improve interpretation consistency. Thank you for your consideration of these comments.

Sincerely,

Alec Davis
Executive Director

Interstate Natural Gas Association of America

Submitted via email: draft_permitting_guidance@epa.gov

May 11, 2020

Anne Idsal
Principal Deputy Assistant Administrator
US EPA, Office of Air and Radiation
Mail Code 6101A
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: INGAA comments on EPA's Draft Guidance Memorandum, "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations" (Mar. 25, 2020)

Dear Ms. Idsal:

The Interstate Natural Gas Association of America ("INGAA"), a trade association that represents members of the interstate natural gas pipeline industry, respectfully submits these comments on the United States Environmental Protection Agency's ("EPA") draft guidance memorandum, "Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations" ("Draft Guidance").

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in the United States. INGAA member companies transport more than 95 percent of the nation's natural gas, through a network of nearly 200,000 miles of interstate natural gas pipelines. Natural gas is a vital component of the United States economy. It is used for heating homes, cooking, drying clothes and as a chemical feedstock to manufacture plastics, fertilizer, and other chemicals and products. It also helps diversify the nation's energy portfolio by providing a reliable source of energy generation. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use natural gas.

The Draft Guidance revises EPA's previous interpretation and concludes that the term "begin actual construction" associated with New Source Review construction permits focuses solely on site activities "on an emissions unit"[1] when considering when actual construction begins.[2] It

[1] As defined at 40 C.F.R. § 52.21(b)(7).
[2] "Begin Actual Construction" is defined at 40 C.F.R. § 52.21(b)(11).

provides a clear and rational explanation of the basis for the interpretation based on the plain language in NSR rules and revisions to those rules that date back to 1980.

The Draft Guidance also explains that past guidance focusing on activities not directly involving an emission unit did not reflect a reasonable reading of the relevant regulatory text because it failed to differentiate between "an emissions unit" and a major stationary source. The revised interpretation set forth in the Draft Guidance is consistent with and a more appropriate reading of the NSR rule text, which clearly associates beginning actual construction with activities related to *an emissions unit*. INGAA supports EPA's decision to revisit previous interpretations and reissue guidance that better comports with the term "begin actual construction" as it relates to an emissions unit. Additional details and comments follow.

1. INGAA supports EPA's interpretation of "Begin Actual Construction" in the March 25, 2020 Guidance Memo.

The Draft Guidance describes EPA's interpretation of what constitutes "beginning actual construction" in response to NSR implementing rules and amendments. NSR rulemakings started with 1978 Prevention of Significant Deterioration and 1979 NSR rules[3] that implemented 1977 Clean Air Act amendments. EPA's initial guidance was issued in December 1978 (i.e., the Reich Memorandum), but NSR rules were extensively amended in 1980. The 1980 amendments are very important because the term "begin actual construction"[4] is explicitly incorporated and a definition is provided that remains today. Those amendments also introduced the term "emissions unit," which is more specific than references to "source" in the earlier rules.

The Draft Guidance provides a detailed review of the rule history and additional guidance issued after the 1980 NSR amendments. INGAA appreciates EPA's thoughtful explanation of the history of NSR rules and analysis of past guidance and flawed interpretations that precluded engaging in a wide range of site preparatory activities required to facilitate construction prior to obtaining an NSR permit. INGAA agrees that the 1978 guidance and subsequent guidance documents did not adequately reflect NSR rule updates promulgated in 1980 that introduced new definitions and reference to an "emissions unit." INGAA agrees with the interpretation that physical activities at a site *not* directly associated with an emissions unit (i.e., the emitting source, such as a reciprocating engine or combustion turbine) do not constitute beginning actual construction and are thus allowed. In addition, INGAA supports the revised interpretation that "installation necessary to accommodate" the emissions unit is not considered part of that emissions unit and is allowed.

This provides the flexibility to undertake reasonable physical on-site activities in advance of obtaining a major NSR permit. Such activities would not entail the construction or operation of the "emissions unit" and thus not result in an increase of emissions from the stationary source. INGAA agrees with the assertion that the revised interpretation is more consistent with regulatory text.

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[3] *See* 43 Fed. Reg. 26,380 (June 19, 1978) (40 C.F.R. part 51); 43 Fed. Reg. 26,388 (June 19, 1978) (40 C.F.R. part 52) (collectively, "the 1978 PSD rules"). The first set of rules implementing the nonattainment NSR program enacted by the 1977 CAA Amendments were promulgated in January 1979. *See* 44 Fed. Reg. 3,274 (Jan. 16, 1979).
[4] 40 C.F.R. § 52.21(b)(11) (1980); 45 Fed. Reg. 52,676, 52,736 (Aug. 7, 1980).

The Draft Guidance resolves problems that can arise from the longstanding policy. Delays in at-risk preconstruction activities not associated with "an emissions unit" can add unnecessary cost and scheduling challenges (e.g., compressing the schedule to deal with weather limitations), potentially subjecting construction to increased safety risk. The policy being supplanted may force schedules outside of optimum weather windows (e.g., avoiding heavy precipitation periods, low ambient temperatures, etc.) that may increase environmental impacts because the operator is waiting for a final determination from the permitting authority. The revised guidance improves the ability of operators to better manage such issues.

2. INGAA agrees that the role of "an emissions unit" must be considered when determining when actual construction begins under New Source Review regulations.

Background in the Draft Guidance clearly shows how the Reich Memorandum, which was released prior to the 1980 NSR amendments, as well as subsequent EPA guidance, is not the best reading of relevant regulatory text in the 1980 amendments because those amendments refer to an "emissions unit," including in the definition of "begin actual construction" – i.e., "initiation of physical on-site construction activities on an *emissions unit* which are of a permanent nature."[5]

The Draft Guidance explains four relevant changes in the 1980 NSR preconstruction permitting provisions[6] and also explains that an activity will constitute the "beginning" of "actual construction" only if it meets all five distinct criteria therein.[7] One key criterion is that physical changes occur "on an emissions unit."[8] These 1980 changes provide a distinction between the major stationary source and emission units within the major stationary source.

EPA has properly supported its interpretation by analyzing past revisions to NSR regulations that provided a distinction between an emissions unit and a major stationary source. This distinction between a major stationary source and the emission unit represents an improved interpretation consistent with the regulatory text.

3. The Draft Guidance could provide additional clarity by providing supplementary discussion and examples.

INGAA understands that the Draft Guidance cannot address every question or concern on this topic and that case specific review will remain part of the process. However, additional clarity could be provided by including supplementary discussion and unambiguous examples based on past permitting experiences. Several examples follow:

- A basis for exempt actions could be defined based on documentation that an "administratively complete" permit application (rather than final permit issuance) is in place, thus allowing pre-construction activities to occur up to the emissions unit. Actions would not be interpreted as "beginning" of "actual construction," as long as a permit application has been deemed administratively complete by the air permitting authority.
- EPA could list preconstruction activities not physically part of the actual "emissions unit," including installations necessary to accommodate that unit. Examples of permissible

[5] Draft Guidance at 7 (quoting 40 C.F.R. § 52.21(b)(11) (1980) (emphasis added); 45 Fed. Reg. at 52,736).
[6] *Id.* at 6-7.
[7] *Id.* at 13.
[8] *See, e.g., id.* at 11, 13.

activities that are NOT initiation of physical on-site construction activities on an emissions unit include, but are not limited to:

- Clearing, grading, filling, drainage and other (e.g., geotechnical site investigation, soil testing, backfilling, blasting, compaction, surveying, etc.) site preparation work.
- Excavation and installation of building supports and foundations.
- Placement of underground and aboveground piping and utilities.
- Storage, warehouse, or office building construction.
- Receipt of equipment and storage with allowances to minimize mobilization to the site of large cranes, including allowing storage of equipment on foundations.[9]
- Retaining walls and berms.
- Demolition of existing buildings/structures.
- Reasonable location of fabrication areas near the proposed emission unit to avoid transporting large fabrication parts over local roadways.
- Installation of support equipment and piping, such as overhead pipe racks and pipe bridges, and buildings.

4. INGAA agrees that owners and operators understand the risk associated with starting preconstruction activities. "Equity in the ground" arguments do not provide a means to "pressure" agencies to issue a permit.

EPA has also correctly concluded that the risks that formed the longstanding rationale for the prior regulatory approach are unfounded, and any on-site construction or preparatory activity that is undertaken prior to receiving an NSR permit is at the applicant's own risk. The Draft Guidance reviews and discusses why rationale from EPA's prior interpretation was no longer valid. Due to concerns with the status and sophistication of permitting programs, the Reich Memorandum noted that once preconstruction activities started, it would be difficult to deny issuance of a permit because of leverage gained by the source owner or operator (i.e., an "equity in the ground" argument). While INGAA believes this basis was questionable even in 1978, INGAA agrees with Draft Guidance discussion noting that this basis clearly is no longer valid when interpreting the term "begin actual construction." It is more likely that the source owner/operator would avoid putting "equity in the ground" if there is a high risk that the air permit will be denied.

State and federal PSD/NSR permitting programs are established and operators clearly understand the associated risks. Operators understand the permitting process for major sources and will not subject projects to unnecessary risk or presume expended equity has any impact on forthcoming permitting decisions. Rather than pressuring agency issuance of a permit, equity invested would more likely provide leverage to the permitting agency, as it could result in a source accepting more stringent requirements (e.g., accept an agency conclusion regarding BACT rather than continuing to negotiate the stringency of BACT). As explained in the Draft Guidance, the rationale from forty years ago is antiquated and no longer applicable.

[9] The emissions unit can be received and stored in the condition provided by the vendor.

5. EPA should promote consistency for state NSR programs while understanding that additional flexibility may be available in state minor source permitting programs.

INGAA understands that state programs may be more restrictive than EPA, but encourages EPA to promote this well thought out guidance for major source/NSR programs across all EPA regions. In addition, EPA should consider codifying the guidance through additional definitions and revised rule text when an opportunity arises in future NSR rulemaking.

While INGAA supports the Draft Guidance, EPA should not inhibit state programs that provide flexibility when determining when construction commences or imply that the guidance applies to flexibility in state minor source programs. Some examples are provided below:

A. New Jersey Administrative Code (N.J.A.C.) Title 7:27-8.1 and 7:27-22.1 (Definitions) - Minor and Major Air Permitting:

   "Construct" or "construction" means to fabricate or erect equipment or control apparatus at a facility where it is intended to be used, but shall not include the dismantling of existing equipment or control apparatus, site preparation, or the ordering, receiving, temporary storage, or installation of equipment or control apparatus. Unless otherwise prohibited by Federal law, this term shall also not include the pouring of footings or placement of a foundation where equipment or control apparatus is intended to be used.

B. Ohio Administrative Code (OAC) Chapter 3745-31-33(D) through (F) include a detailed list and are provided as Attachment A. Section (B) is also shown because it illustrates language that acknowledges the risk accepted by the operator, as discussed in Comment 4.

C. Alabama Administrative Code (AAC) Chapter 335-3-14-.01(1)(a) General Provisions for Non greenfield and Non NSR-/PSD-major modifications:

   "Any person building, erecting, altering, or replacing any article, machine, equipment, or other contrivance, the use of which may cause the issuance of or an increase in the issuance of air contaminants or the use of which may eliminate or reduce or control the issuance of air contaminants, shall submit an application for an Air Permit at least 10 days prior to construction."

In addition, EPA should strive for consistency with other related documentation. For example, EPA should update the New Source Review Workshop Manual to reflect this guidance. This manual is a commonly used EPA document and should be updated to conform to this guidance. Other examples likely exist and EPA should review available programmatic material.

6. INGAA understands that clearly defining what constitutes "an emissions unit" is beyond the scope of the Draft Guidance, but that NSPS and NESHAP regulations may provide a framework. There are clear examples for equipment typical at natural gas transmission compressor stations and storage facilities.

The Draft Guidance notes that ascertaining what constitutes an emission unit is beyond the scope of the document, and parties will have to exercise judgment and conduct case-specific review. However, it is also noted, sources and permitting authorities have experience in defining an emission unit and other regulatory examples are available. For example, a New Source Performance Standard (NSPS) is "one source of information that may be helpful in defining an emission unit…." Similarly, National Emission Standards for Hazardous Air Pollutants (NESHAPs)

may provide context. For a natural gas transmission compressor station or storage facility, there are clear examples of an emission unit.

In NSPS (40 C.F.R. Part 60) and NESHAP (40 C.F.R. Part 63) regulations, EPA consistently defines emission units that are common in natural gas operations. This includes natural gas-fired reciprocating internal combustion engines (40 C.F.R. Part 60, Subpart JJJJ and Part 63, Subpart ZZZZ) and natural gas-fired stationary combustion turbines (40 C.F.R. Part 60, Subpart GG and Subpart KKKK and Part 63, Subpart YYYY). These source types meet the definition and intent of "emissions unit" in NSR rules and the Draft Guidance. In the final guidance document, identifying these source types and additional examples of "emission units" would provide additional clarity.

In closing, INGAA reiterates concurrence with the Draft Guidance interpretation that preserves the intent of the 1977 Clean Air Act amendments and 1980 NSR rules amendments regarding preconstruction permits, while resolving a longstanding issue that has caused unnecessary costs and project delays. As noted in the Draft Guidance, INGAA understands that the Draft Guidance interpretation is not subject to notice-and-comment rulemaking requirements; however, INGAA appreciates the opportunity to support and provide comment on this important memorandum. If you have any questions, please contact me at ssnyder@ingaa.org or 202-216-5955. Thank you.

Sincerely,

Sandra Y. Snyder
Vice President, Environment
Interstate Natural Gas Association of America

Attachment A: Ohio State Program Regulatory Text

cc: Juan Santiago, U.S. EPA (santiago.juan@epa.gov)

Attachment A: Ohio State Program Regulatory Text

Ohio Administrative Code (OAC) Chapter 3745-31-33 (B), and (D) through (F)

"(B) Risk to the owner or operator:

(1) This rule does not in any way guarantee that a final permit-to-install or PTIO will be issued.

(2) The implementation of any of the activities described in this rule are at the entire risk of the owner or operator.

(3) If a final permit-to-install or PTIO is issued, any necessary design changes, and the costs associated with those design changes (including costs due to delayed construction) in order to comply with the terms of the final permit-to-install or PTIO are entirely at the owner or operator's risk. Any costs associated with these design changes may not be used as part of any BAT, BACT, LAER or MACT determination cost-effectiveness evaluations.

…

(D) Installation of buildings or structures not containing air contaminant sources.

The construction of warehouses, store rooms, office buildings, or other buildings or structures that are not planned to contain any air contaminant source as part of an air contaminant source project may be constructed prior to obtaining a final permit-to-install or PTIO if the buildings or structures would be built (for business financial reasons) even though no final permit-to-install or PTIO could be obtained.

(E) Acceptable site preparation activities for any air contaminant source project.

The following activities do not constitute beginning actual construction and may be undertaken prior to obtaining a final permit-to-install or PTIO for a particular air contaminant source project:

(1) Clearing the site of existing vegetation, old buildings, or old equipment.

(2) Grading and clearing of land, stripping and stockpiling topsoil, earthwork cut and fill for foundations in preparation for construction.

(3) Installing temporary site access roadways and parking areas.

(4) Installing temporary construction equipment storage areas.

(5) Storing of construction equipment including temporary buildings and trailers for equipment storage and for construction offices.

(6) Exploratory excavation and borings to assess the suitability of a site for the intended building or installation activities.

(7) Excavating building footers, pilings, foundations, pads, and platforms, etc. (note, no pouring of concrete is allowed).

(8) Installing concrete forms and reinforcing bar for any concrete footers, pilings, foundations, pads and platforms, etc. (note, no pouring of concrete is allowed).

(9) Installing temporary utilities for site construction including electricity, water, gas, communication and sanitary.

(10) Removing old equipment from existing buildings.

(11) Installation of any temporary construction dust control systems (sprinklers, etc.).

(12) Installation of any signage or traffic control signs.

(13) Installation of any utility poles by a utility company.

(14) Installation of temporary erosion and sedimentation control systems including hay bales, silt fences, rip-raps and sandbags.

(15) Installation of new landscaping including trees, bushes and seeding of disturbed earthwork.

(16) Installation of landscaping fencing.

(17) Installation of temporary fences and signs around the construction site.

(18) Stockpiling of stone, soil and other materials for future construction.

(F) Additional acceptable site preparation activities for any source that is not a major new or modified source (i.e., minor modifications and minor new sources).

The following additional site preparation activities may be undertaken prior to obtaining a final permit-to-install or PTIO provided the air contaminant source project is not a major modification, a major stationary source, or part of a permit-to-install or PTIO designed to avoid a major modification or classification of a major stationary source through permit-to-install or PTIO restrictions (known as a synthetic minor or netting permits avoiding major new source review). These activities may only be undertaken if the owner or operator has filed a complete application for a permit-to-install or PTIO, the director or his/her designee has determined the application is administratively complete, and the owner or operator has provided notification, in a form and manner prescribed by the director, of the activities described in this rule that the owner or operator plans to undertake prior to receiving a final permit-to-install or PTIO.

(1) Installing electrical service for any air contaminant source or air pollution control equipment up to the service panel for the new equipment. Connections to any air contaminant source or air pollution control equipment cannot be made until a final permit-to-install or PTIO is issued and effective.

(2) Installing piping and sewers up to the point of connection to any air contaminant source or air pollution control equipment. Connections to any air contaminant source or air pollution control equipment cannot be made until a final permit-to-install or PTIO is issued and effective.

(3) Installing inlet air and exhaust duct work with the exception of final connections to the air contaminant source or air pollution control equipment.

(4) Installing concrete footers, foundations, pads and platforms for the building or for equipment.

(5) Installing any permanent roadways and parking areas not required under this chapter to obtain a permit-to-install or PTIO.

(6) Storing parts and equipment of the air contaminant source or air pollution control equipment.

(7) Construction of new or expanded buildings, or the renovation or upgrading of existing buildings, in preparation for the installation of new or modified air contaminant source or air pollution control equipment.

(8) Equipment that constitutes a component of an air contaminant source (including air pollution control equipment) may be delivered to the site prior to obtaining a final permit-to-install or a PTIO if the following criteria are met:

(a) If the equipment is to be installed in an existing building, then it may be placed in its final location and secured. No utilities, piping, or duct work may be connected to the equipment. The equipment shall not be operated.

(b) If the equipment is to be installed in a building that has not yet been built, then it can either be secured on the foundation of its final site or may be located anywhere on the property. No utilities, piping, or duct work may be connected to the equipment. The equipment shall not be operated."

May 11, 2020

Submitted electronically
Attn: draft_permitting_guidance@epa.gov
U.S. Environmental Protection Agency

Dear Sir/Madam:

The Iowa Department of Natural Resources (Iowa DNR) respectfully submits the following comments and questions regarding EPA's proposed guidance document *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*, which was released for public review and comment on March 25, 2020.

The proposed guidance is a new interpretation of the definition of "begin actual construction" under the New Source Review (NSR) permitting program. EPA is proposing to set five (5) criteria that, combined, identify the type of activities an owner or operator are precluded from doing prior to obtaining an NSR permit. Activities that (1) are "physical" in nature, (2) undertaken "on-site," (3) involve "construction," (4) are "on an emissions unit," and (5) are of a "permanent nature" cannot be done prior to obtaining an NSR permit. An activity will constitute the "beginning" of "actual construction" only if it meets all five of these criteria. EPA also said emphasis needs to be put on item #4 in that the construction needs to be on an emission unit.

These criteria are from the first sentence of the definition of "begin actual construction" which is:

> "… initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change."[1]

This is slightly different than the language in the Clean Air Act (CAA) which, in part, says no major emitting facility may be constructed unless a permit has been issued.[2]

EPA's proposed guidance puts an emphasis on the "emissions unit," but EPA specifically stated detailed guidance on parameters to be "ascertained for purposes of determining whether a given activity constitutes "construction … on an emissions unit" is beyond the scope of the memorandum."

EPA notes in the proposed guidance that the evaluation of what constitutes an emissions unit is a task that sources and permitting authorities already do, but in a different context. EPA did provide a few examples of where it had provided guidance on determining an emission unit for a couple of specific situations.

[1] 40 CFR §52.21(b)(11)
[2] 42 U.S.C. §7475 (July 14, 1955, ch. 360, title I, §165, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 735; amended Pub. L. 95-190, §14(a)(44)-(51), Nov. 16, 1977, 91 Stat. 1402.)

The Iowa DNR has concerns with EPA proposing revised guidance without providing assistance on what constitutes an emissions unit. Currently, an evaluation of an "emissions unit" is not normally done unless it is necessary for a specific regulation and in those situations it is not related to items such as supports, foundations, and underground pipework.

The NSR regulations define emissions unit as "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant and includes an electric utility steam generating unit."[3] However, this does not provide any detail on where an emissions unit begins or ends. This can be a very complex and subjective decision. Below are just a few questions that would have to be evaluated on a case-by-case basis for each emissions unit within a project:

- Is the control equipment considered part of the emissions unit or is it only the piece of equipment that generates emissions?
- Is a software program/neural network part of the emission unit?
- What portion of a facility's electrical systems are considered part of the emissions unit?
- If the emissions unit uses natural gas, at what point within the property is the natural gas piping part of the emissions unit?
- Is the whole building foundation part of the emissions unit or only the part under the emissions unit and if it's only part of the foundation, how much?

These are only a few of the potential questions that would need to be answered as part of a determination on what part of a facility or project that could begin actual construction under EPA's new interpretation. Large NSR projects can have more than twenty emissions units. Having to make these determinations on each individual emission unit within a project could result in significantly increasing permit turnaround times as staff time will be devoted to answering questions on where the emissions unit begins and ends for construction rather than completing the review process to issue permits to allow the construction of the full project to begin.

Therefore, the Iowa DNR has the following questions related to EPA's new interpretation on "Beginning Actual Construction":

- Does EPA intend to provide either new guidance or an updated definition for "emissions unit" as it relates to beginning actual construction? If so, what is the timeframe for the new guidance or definition?
- Has EPA evaluated the amount of additional permit review time that will result from its new beginning actual construction guidance? If an evaluation has been completed, could EPA provide it to the general public? If an evaluation has not been done at this time, could EPA complete one and provide it to the general public?

Overall, the New Source Review is a preconstruction permitting program with a goal to preserve, protect, and enhance our existing air quality while also insuring economic growth will occur. An important factor in meeting these objectives is to have clear, concise regulations that are easy to understand for everyone: the regulated community, the public, and the state and local programs that implement the rule. In addition, it is important to be able to issue timely permits so sources can construct their projects. EPA's proposed Begin Actual Construction guidance appears to add more complexity and less certainty to the NSR permitting process. This

[3] 40 CFR §52.21(b)(7)

additional complexity could potentially increase permit issuance times which would be a detriment to the program.

Thank you for considering our comments. Please contact Chris Roling at 515-725-9557 or Chris.Roling@dnr.iowa.gov if you have questions or would like additional information.

Sincerely,

Catharine Fitzsimmons, Chief
Air Quality Bureau

ANDY BESHEAR
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REBECCA W. GOODMAN
SECRETARY

ANTHONY R. HATTON
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May 11, 2020

Ms. Anne Idsal
Principal Deputy Assistant Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington DC, 20460

RE: Memorandum "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations"

Ms. Idsal,

On behalf of the Commonwealth of Kentucky, the Energy and Environment Cabinet (Cabinet), the Division for Air Quality (Division) appreciates the opportunity to provide feedback on the draft guidance published on March 25, 2020, regarding the interpretation of "begin actual construction" under the New Source Review (NSR) preconstruction permitting program.

As the delegated authority for the NSR and Prevention of Significant Deterioration (PSD) programs under the Clean Air Act (CAA), the Cabinet has adopted a definition of 'begin actual construction' in 401 KAR 51:001, Section 1(24) that reads:

> *""Begin actual construction" means: (a) Initiation of physical on-site construction activities on an emissions unit that are of a permanent nature and include installation of building supports and foundations, laying underground pipe work, and construction of permanent storage structures; and*
> *(b) For a change in method of operations, those on-site activities, other than the preparatory activities, that mark the initiation of the change."*

This definition is almost identical to the definition found in 40 C.F.R. § 52.21(b)(11), which reads:

> *"Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to*

a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change."

The Division finds that the new interpretation contradicts the codified regulatory definition found in 40 C.F.R. § 52.21(b)(11). The Division requests that EPA codify this new interpretation and amend the definition accordingly. Codification of the revised definition then would allow states to adopt the same definition. Changing the interpretation of 'begin actual construction' without codifying the change leads to regulatory uncertainty for permitting programs and the regulated community.

In Kentucky, KRS Chapter 13A prohibits the Cabinet from regulating by policy, memorandum, or guidance. Specifically, KRS 13A.130 prohibits the Cabinet from modifying an administrative regulation by internal policy, memorandum, or guidance, and any such attempt is null, void, and unenforceable. Without proper codification of the new interpretation, Kentucky will not be able to change the regulatory definition of 'begin actual construction' found in 401 KAR 51:001.

In addition, without being properly codified in the Code of Federal Regulations, this new interpretation may place Kentucky at an economic disadvantage, as other states may be able to adopt the new interpretation.

The Division appreciates the opportunity to provide comment and feedback on the draft guidance. If you have any questions, please do not hesitate to contact me at Melissa.Duff@ky.gov.

Sincerely,

5/11/2020

X 

Melissa Duff, Director
Kentucky Division for Air Quality
Signed by: Melissa Duff

Louisiana Chemical Association
Gregory M. Bowser, President & CEO

May 11, 2020

Via Email Only
draft_permitting_guidance@epa.gov

Re: Comments of the Louisiana Chemical Association
Draft Guidance on
Interpretation of "Begin Actual Construction"
under EPA's New Source Review
Preconstruction Permitting Regulations (Mar. 25, 2020)

To Whom It May Concern:

The Louisiana Chemical Association ("LCA") is pleased to submit these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "the Agency") draft guidance document entitled, Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations (the "Draft Guidance").

Introduction

LCA is a nonprofit Louisiana corporation, composed of 63 members with over 100 chemical manufacturing plant sites in Louisiana. LCA was formed in 1959 to promote a positive business climate for chemical manufacturing that ensures long-term economic growth for its member companies. LCA members are committed to excellence in safety, health, security, and environmental performance, and to earning our "license to operate." LCA's member companies are subject to the Draft Guidance, as they own and operate facilities throughout the United States that are subject to Clean Air Act regulation, including Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") (collectively, "NSR") preconstruction review and permitting requirements under Title I of the Act.[1]

LCA strongly supports the Agency's proposal to revise the interpretation of "begin actual construction," as that phrase is meant under the NSR program. As noted by EPA, the current

[1] LCA's members are also subject to minor NSR programs that apply under State Implementation Plans ("SIPs"), which often use the term "begin actual construction" or a similar one. Thus, the Draft Guidance may also be relevant to states' interpretation of minor NSR applicability.

interpretation of that phrase is unduly restrictive and proscribes a host of different activities that in no way involve construction "on an emissions unit." Under the current interpretation, there are many preparatory activities that would be desirable to undertake prior to obtaining an NSR permit that are instead restricted. LCA agrees with EPA's decision to return to an approach that is consistent with the underlying regulatory language. LCA believes that the revised interpretation of "begin actual construction" will have a positive impact on the regulated community by improving productivity, streamlining projects at major and minor sources, and providing much needed clarity, certainty, and flexibility to the permitting process.

As EPA states, a prerequisite to having "beg[un] actual construction" is that construction activities actually have been conducted "on an emissions unit." The Draft Guidance basically provides that, for the most part, any construction on things other than "an emissions unit" can proceed before a permit is issued. The Draft Guidance discusses the definition of that term, but ultimately concludes that what constitutes "an emissions unit" is a case-by-case determination to be left to the permitting authorities. The Agency recognizes that the scope of what constitutes an "affected facility" under an New Source Performance Standard ("NSPS") or National Emission Standards for Hazardous Air Pollutants ("NESHAP") is informative in defining the approach for determining the extent of equipment that comprises "the emissions unit." LCA believes it would be helpful for the Agency in the future to provide guidance to permitting authorities and the regulated community as to what constitutes "an emissions unit." Such guidance can be provided at a later time, however, as LCA urges EPA to finalize this draft guidance as soon as practicable.

Should you have any questions regarding the written comments of LCA, please do not hesitate to contact me at tokesha@lca.org.

Thank you for your assistance and cooperation.

Very truly yours,

Tokesha M. Collins-Wright

Tokesha M. Collins-Wright
LCA, Vice President of Environmental Affairs

May 11, 2020

To Whom it May Concern,

EPA's proposal to revise its New Source Review guidance conflicts cannot be squared with the Clean Air Act. The Memorandum for Public Review describes the revised interpretation as follows:

> Under EPA's revised interpretation, a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction on an emissions unit, as the term is defined in 40 CFR § 52.21(b)(7).5 Further, under this revised interpretation, an "installation necessary to accommodate" the emissions unit at issue is not considered part of that emissions unit, and those construction activities that may involve such "accommodating installations" may be undertaken in advance of the source owner or operator obtaining a major NSR permit.

As described below, the proposed changes conflict with the Clean Air Act's provisions on New Source Review in both the PSD and Nonattainment sections. The changes of longstanding interpretations are also unwise as a policy matter. Finally, they appear to be an attempt to do an end run around the requirements of the National Environmental Policy Act.

Clean Air Act Section 165 (42 USC 7475) applies to "major emitting facilities on which construction is commenced" in areas subject to Prevention of Significant Deterioration. That section prohibits parties from "commencing" (not finishing) construction on a "major emitting facility." A major emitting facility is specifically defined in for purposes of PSD[1]. The

[1] (1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal

definition describes entire industrial plants--such as fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants.. and entire refiners-- that emit certain quantities of pollutants. The statute does not allow permitting bodies to wait until some specific component of the plant is being added to determine whether permit should be granted. The preconstruction permitting requirement applies to entire plants, not their subparts. The draft guidance attempts to redefine the preconstruction rule in a manner that directly conflicts with the statutory language.

The statute also requires that, before the permit is issued, interested persons be given the opportunity to comment at a public hearing "to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 USC 7475 (a)(2). The public's ability to meaningfully comment on the proposed permit and to propose alternatives to proposed source would clearly be undermined if the location were pre-selected. Congress intended that the opportunity for public comment should provide a meaningful opportunity to affect decision-making, not serve as a façade of public participation.

The revised interpretation cannot be squared with the statutory definition of "commencing construction:" CAA Section 169 states:

> The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.[2]

The proposed change also directly conflicts with the permitting requirements that CAA 173 mandates for New Source Review in nonattainment areas. *Before* issuing the permit, the permitting agency must evaluate the necessity of using the selected site itself:

> **(a)IN GENERAL**The permit program required by section 7502(b)(6) [1] of this title shall provide that permits to construct and operate may be issued if— . . .

---

units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State. 42 USC 7479.

[2] 42 USC 7479 (2) (A)

> **(5)**an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Contrary to the statute, the proposed guidance's narrow focus on a small component of a larger facility, allows the owner or operator to begin construction of related components at a specific location before the permitting agency has made the statutory determination that the benefits of the source's location significant outweigh the environmental and social costs of using this site.

The changed interpretation will confuse state permitting agencies and potential permittees as well. It may cause some entities to develop momentum behind projects that cannot meet the permitting requirements; alternatively, it may make regulators hesitate to impose the broader restrictions that would have been available before construction on the source had commenced. The proposed language certainly undermines the public's ability to effectively comment by narrowing the focus of their comments. Finally, by delaying initiation of the NEPA process, the revised language undermines meaningful impacts analysis. In the end, however, the language simply conflicts with the statute and it would be an abuse of the agency's discretion to adopt it.

First Name: Philip
Last Name: Ferguson
Organization: LP Building Products
Email address: Phil.ferguson@lpcorp.com
Comment: We applaud the common sense revised guidance. Not being able to perform more than grubbing and clearing has often in cold weather climates led to substantial project delays for foundations and other critical work.
With long lead time equipment purchases construction many times has to be staged in a more costly manor and prevented us from fully cashing In on capital expenditures. We have always been willing to take the risk that the
project could be changed by later permitting. I believe EPA is absolutely
correct in that this may lead to facilities accepting more stringent permit requirements rather than more lax since we will have more equity in the ground.

First Name: Mahsa
Last Name: Tamjidi
Organization: DOE
Email address: (b) (6)
Comment:
Hi
I m head of air pollution modeling an permitt in IRAN THANKS

May 7, 2020

Ann L. Idsal
Principal Deputy Assistant Administrator
United State Environmental Protection Agency
New Source Review Group
Mail Drop C504-03
Research Triangle Park, NC 27711

Re: Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations via draft_permitting_guidance@epa.gov

Dear Ms. Idsal:

The Marcellus Shale Coalition (MSC) was formed in 2008 and is comprised of approximately 150 producing, midstream, transmission and supply chain members who are fully committed to working with local, county, state and federal government officials and regulators to facilitate the safe development of natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, gathering, processing and transmission in the country, as well as the suppliers and contractors who partner with the industry.

The MSC appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (US EPA or Agency) above-referenced draft guidance. The MSC believes that the current interpretation of "begin actual construction" is overly broad and restrictive and deviates from the plain language of the applicable federal regulation.[1] As acknowledged in the US EPA's draft guidance memorandum,[2] this interpretation precludes many source owners/operators from engaging in critical preparatory activities related to the ultimate construction, installation and operation of an emissions source. While certain activities, such as site clearing, grading and temporary storage of equipment and materials currently are authorized, other activities regarded as "permanent" in nature – but not directly involving the construction of an emissions unit – are precluded.

By applying an overly broad interpretation of the phrase "begin actual construction", US EPA and by extension those state, tribal or regional authorities that rely upon the US EPA's interpretation impose unnecessary costs and delays on projects. In addition to added costs and

[1] 40 CFR §52.21(b)(11): ***Begin actual construction*** means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.
[2] https://www.epa.gov/sites/production/files/2020-03/documents/begin_actual_construction_032520_2.pdf (March 25, 2020)

unnecessary delays to projects, such interpretation can discourage certain work that could otherwise be slated for more optimal seasonal times, including drier weather or during more reasonable temperatures, and therefore may result in greater impacts to the environment.

Revision of this interpretation is warranted as well because the current iteration focuses upon the phrase "actual construction" while ignoring the clear regulatory language tied to this phrase; namely actual construction activities on an emissions unit which are of a permanent nature. It is eminently reasonable to infer that by including examples of types of activities tied to construction of an emissions unit, US EPA also envisioned permissible types of activities which are *not* tied to construction of an emissions unit. Unfortunately, the current interpretation severely restricts such an application and therefore reinforces the reasonableness of the Agency's revised interpretation.

The revised interpretation will now clearly permit activities related to installations that are necessary to accommodate the emissions unit. Operators undertake such activities at their own financial risk, and understand that doing so does not, in any manner, impact a decision related to whether a New Source Review permit will be issued. Moreover, the new guidance establishes a clear test when evaluating whether an activity is prohibited prior to issuance of the New Source Review permit: that it is physical in nature, occurs on site, involves construction, is on an emissions unit and is of a permanent nature. The activity must meet each of these five criteria in order to be prohibited prior to construction.

The new guidance would allow reasonable "at risk" activities necessary to accommodate the emissions unit that would not be considered the start of construction. Examples of these type of activities could include many actions up to final process and utility connections to the emissions source. Looking at multiple states' minor source programs, reasonable accommodation is given to allow for:

- Clearing and Grading and other site preparation work including placement of underground piping and utilities. (No final connections)
- Excavation and installation of foundations
- Receipt of equipment and storage with allowances to minimize mobilization to the site of large cranes. This included allowing storage of equipment on foundations.
- Reasonable location of fabrication areas near the proposed emission source location to avoid transporting large fabrication parts over local roadways.
- Installation of support equipment, such as overhead pipe racks and pipe bridges, and buildings.

Final process or utility connections would not be included in "at risk" construction.

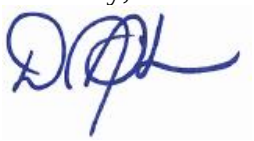
This revised interpretation more accurately adheres to the actual regulatory text found in 40 CFR §52.21(b)(11) and replaces a myriad of conflicting and confusing central and regional office memoranda issued by various US EPA offices over the years. It improves significantly the understanding by the regulated community of what constitutes "begin actual construction" on an emissions unit, saving time and money for applicants while ensuring that the regulatory obligations of the Agency are still met.

The MSC agrees with the Agency that it is appropriate to update the interpretation of beginning of actual construction as the permitting process has matured significantly since the start of the 1977 PSD and 1980 NSR programs and the referenced related interpretations on start of construction. The formalization of the permitting process and greater understanding of the requirements and concerns of these programs by both industry and regulatory agencies has grown significantly. The development and availability of related tools such as the RACT/BACT/LAER Clearinghouse and dispersion modeling are examples of the improvement of the process.

These current permit programs and tools allow for discernment of reasonable project expectations. These expectations allow for the development of a well-defined project scope regarding air quality requirements and for a complete permit application, as defined by the reviewing agency, to be submitted prior to any at risk construction.

For these reasons, the MSC is pleased to extend its support for both the draft guidance as well as the explanation and rationale offered by the US EPA. Should you have any questions concerning these comments, please do not hesitate to contact me.

Sincerely,



David J. Spigelmyer
President

First Name: Mark
Last Name: Salih
Organization:
Email address: (b) (6)
Comment: It would be a big boost to companies if they could start structural steel and foundation work before a NSR permit is received. The company would take the brunt of allocating resources and speculation that a permit would be forthcoming. If for any reason the permit was in jeopardy, the company could halt construction at will until the issue is resolved. I agree this would be limited to non-emission unit work. A company has numerous construction activities that must be completed before actually building the emission unit and this new interpretation gives companies the flexibility to "get ready"
for the new unit as the permitting process unfolds. This allows accelerated completion of projects and puts employees to work in a expeditious manner without compromising the integrity of controlling emissions to the environment.

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May 11, 2020

Juan Santiago, Associate Division Director
Air Quality Policy Division
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency

Re: *Draft* "Interpretation of 'Begin Actual Construction' Under the NSR Preconstruction Permitting Regulations"

The Minnesota Pollution Control Agency (MPCA) appreciates the opportunity to comment on the *Draft* "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations" from the Environmental Protection Agency (EPA), available at https://www.epa.gov/nsr/forms/draft-guidance-interpretation-begin-actual-construction-under-new-source-review.

The MPCA finds the interpretation presented by EPA to be flawed, and urges EPA to withdraw this proposal. Namely, the proposed interpretation:

- Clouds the clarity of the rule;
- Contradicts common sense;
- Ignores the plain language of the definition in the Prevention of Significant Deterioration (PSD) rule;
- Promotes permissive interpretations from competition among states;
- Weakens the ability of permitting authorities to make decisions contrary to applicants' proposals;
- Erodes trust between the public and air quality agencies, particularly in areas of Environmental Justice concerns; and
- Diminishes the effectiveness of the PSD program, increases its complexity, and creates inconsistency in its application.

The current long-standing interpretation of the definition of "begin actual construction" is well understood. Early in the PSD era, EPA responded on a case-by-case basis to questions about what activities were allowed before a company received a PSD permit. This led to inconsistent interpretations.

In response, EPA clarified the issue to reduce confusion and promote consistency. EPA's 1978 guidance[1] defined allowable pre-construction activities (i.e., "planning, ordering of equipment and material, site-clearing, grading, and on-site storage of equipment and materials") that can be taken at the risk of the owner or operator. It also identified pre-construction activities prohibited under all circumstances (i.e.,

[1] Edward Reich, EPA. "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit." December 18, 1978.

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"installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature").

The promulgation of the 1980 PSD rule raised concerns that the policy had changed, requiring further clarification. The 1986 memorandum discussing "Construction Activities Prior to Issuance of a PSD Permit with Respect to 'Begin Actual Construction'"[2] provided that clarity. The 1986 memo reiterated that, even after the promulgation of the 1980 PSD rule, the 1978 memo ("Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit") continues to define the allowable pre-construction activities (i.e., planning, ordering of equipment and material, site-clearing, grading, and on-site storage of equipment and materials) that can be taken at the risk of the owner or operator. Critically, the memo also identifies pre-construction activities prohibited under all circumstances (i.e., installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature).

These two memos bracket the 1980 PSD rulemaking and they are contemporaneous with the rulemaking, thus providing the best insight into the definition of "begin actual construction" intended by the rule authors. This understanding is reinforced by a 1981 letter from Valdas Adamkus,[3] the Regional Administrator of EPA Region 5. Mr. Adamkus' letter, written less than one year after the 1980 PSD rule was promulgated, states that the definition of "begin actual construction" in the 1980 rule is "based on Mr. Reich's December 18, 1978 memo, and was intended to embody in regulatory form the Agency's policy that site preparation activities do not trigger Federal PSD requirements." It makes sense that the reliance of the 1980 rule on the 1978 memo extends to impermissible activities as well. This interpretation has generally been supported by EPA and by PSD permitting authorities for nearly forty years.

Now, in 2020 and with no material change in circumstances since, EPA indicates that it understands the meaning of the term "begin actual construction" better than those who wrote the original rule and interpretations. Common sense suggests that the people that wrote the 1980 PSD rule and those who worked with them are much more likely to understand the original intent of the rule language, as described in contemporaneous memorandums, and their interpretations should receive deference.

EPA now seeks to support its change in interpretation by taking a much narrower reading of the rule than the authors intended and as understood through a common sense reading of the rule. "Construction activities … on an emissions unit" is not the same as "construction … on an emissions unit." The clearest and most logical reading of the rule is that "construction activities" are not limited solely to construction on an emissions unit but include all the construction activities that are necessary for the eventual operation of an emissions unit.

EPA's proposed interpretation also appears to ignore the plain language of the rule itself. The second sentence of the definition of "begin actual construction" indicates that EPA intended for activities that "include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures" to describe a minimum subset of the "physical on-site construction activities on an emissions unit which are of a permanent nature," which represent impermissible construction prior to permitting. The presence of this second sentence ensures

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[2] Edward Reich, EPA. "Construction Activities Prior to Issuance of a PSD Permit with Respect to 'Begin Actual Construction.'" March 28, 1986.

[3] Valdas Adamkus, EPA. Letter to Joseph Polito, Esq. April 29, 1981.

that the overall understanding of "begin actual construction" does not become too narrow, and EPA cannot simply ignore language in its own rule.

However, in the current memo, EPA asserts that "each example must satisfy the criteria in the first sentence of the definition in order for that activity to constitute 'begin[ning] actual construction'" and that "the activity must involve construction 'on an emissions unit'" while ignoring the "of a permanent nature" criteria. In other words, EPA believes that the first sentence can limit the reach of the second sentence, to the point of rendering the expansive list of second sentence irrelevant. The MPCA disagrees with this assertion, as EPA appears to be inappropriately ignoring the plain language of the second sentence by misinterpreting the first. This change is consequential, as now a permitting authority must conduct a deeper inquiry into the details of work proposed prior to issuance of a permit.

Rather than attempting to "re-interpret" the clear and well-understood definition of "begin actual construction" in a process outside a notice and comment rule procedure, EPA should initiate formal notice and comment rulemaking to modify the definition. Although more time-consuming, modifying the definition through a notice and comment rulemaking would better achieve the goal that EPA seeks and would ensure due process for all affected and interested stakeholders. However, that route would probably still create problems for permitting authorities as they attempt to apply EPA's desired understanding.

EPA has been clear that permitting authorities with State Implementation Plan (SIP)-approved PSD programs may continue to interpret the definition of "begin actual construction" as they have in the past and would not have to adhere to EPA's new interpretation. The MPCA appreciates this recognition of state authority, but EPA then places an individual state agency in a position where its in-state industrial stakeholders will pressure the agency to conform to the least-restrictive definition, such as the one provided by EPA in its draft memo. Additional pressures will exist when a project proposer has the option to build in a state that has adopted the new policy versus a state that has chosen to retain all previous EPA's policies. A state that has the more restrictive position on construction will be at a distinct disadvantage and will find it difficult to maintain its stance.

Many permitting efforts are already subject to political pressures related to the timing of permit issuance and the contents of permits. Hence, even a permitting authority that adopts EPA's proposed definition of "begin actual construction" could be placed at a disadvantage in high profile or publicly funded projects. For example, for a project that relies on any public funds, it would be difficult for a permitting authority to contradict "equity in the ground" arguments, even though the fault lies with the project proposer. In the best case, public opinion would likely harm the permitting authority as well as the project proposer.

While publicly-funded projects would create the most leverage over the permitting authority for the project proposer, the disadvantage provided by equity in the ground would extend to any project with a large perceived public benefit, such as the prospect of new jobs. Simply put, EPA's proposal gives the project proposer too much leverage over the permitting authority and the permitting process, contrary to EPA's stated opinions.

In addition, interested parties including Federal Land Managers, environmental groups, tribes, and local residents could determine that "equity in the ground" precludes full consideration of adverse comments

that they have on a project. Such a situation would create significant challenges for a state that seeks to ensure Tribal Governments and citizens have a fair opportunity to participate in the permitting process, especially in areas of Environmental Justice concern. This places the permitting authority in a difficult situation when responding to comments, particularly if it produces a draft permit for a project. At best, failure to agree with the adverse comments will sow distrust between the commenters and the permitting authority. At worst, projects will be delayed and jeopardized by court challenges.

EPA justifies its recent efforts to modify PSD largely with anecdotal reports from the regulated industries, failing to provide an informed, balanced approach to its regulatory activities. Although EPA is very receptive to industrial interests, they expend minimal effort to engage with environmental groups or to listen and appreciate the counsel of air quality agencies in their efforts to temper EPA's erosion of the PSD program and other Clean Air Act programs. We urge EPA to withdraw this proposed interpretation.

If you have further questions regarding these comments, please contact Richard Cordes at Richard.Cordes@state.mn.us or (651) 757-2291.

Sincerely,

Frank L Kohlasch
Climate Director
Minnesota Pollution Control Agency

RC/flk

cc:
John Mooney, EPA Region 5
Doug Wetzstein, MPCA

NACAA
national association of clean air agencies

May 11, 2020

U.S. Environmental Protection Agency
Submittal via web form and email: draft_permitting_guidance@epa.gov

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the Environmental Protection Agency's (EPA's) draft guidance document, *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*, which was released for public review and comment on March 25, 2020. NACAA is the national, non-partisan, non-profit association of air pollution control agencies in 41 states, including 116 local air agencies, the District of Columbia and four territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

In the draft guidance, EPA introduces a new interpretation of the phrase "begin actual construction" as it appears in rules implementing the New Source Review (NSR) permitting program. Those regulations provide that no owner or operator of a new major stationary source or a source undertaking a major modification shall "begin actual construction" before obtaining an NSR permit.[1] "Begin actual construction" is defined by the regulations as follows:

> *Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change. [2]

[1] 40 C.F.R. § 52.21(a)(2)(iii).

[2] *Id.* § 52.21(b)(11).

Under EPA's previous, longstanding interpretation of this language, iterated in a succession of memoranda dating back to at least 1986 (a history that EPA recounts extensively in the draft guidance), construction activities that could not proceed prior to obtaining an NSR permit included any construction that is "costly," that "significantly alters the site," and/or is "permanent in nature." Further, EPA construed the rules as prohibiting any preconstruction "intended to accommodate an emissions unit" or which is an "integral part of the source or modification." State and local air permitting authorities have accumulated decades of experience in applying this interpretation.

With the draft guidance, EPA is adopting a revised interpretation that represents a wholesale change from its previous approach. The agency's new interpretation provides that a source owner or operator may, prior to obtaining or even applying for an NSR permit, undertake physical, on-site activities – including activities that may be costly, that may significantly alter the site and/or are permanent in nature – provided that those activities do not constitute physical construction on an "emissions unit," as the term is defined in 40 C.F.R. § 52.21(b)(7) ("any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant…"). Further, an "installation necessary to accommodate" the emissions unit at issue is *not* considered part of that emissions unit, and construction activities that involve such "accommodating installations" may be undertaken before the owner or operator obtains an NSR permit. All told, the revised interpretation would allow a great deal more construction to occur prior to permit issuance than has been allowed in the past.

NACAA acknowledges that, in certain instances, the remoteness of a construction site coupled with extreme climatic conditions may require extensive preparatory work on a staged and often seasonal basis over multiple years. Such situations may warrant an alternative approach narrowly aimed to solve that issue. However, such decisions are best left to be managed by the state or local permitting authority.

As we explain below, NACAA has a number of concerns with EPA's draft guidance. The stark change that it represents when compared to EPA's previous policy, coupled with the conspicuous lack of direction on how it is to be implemented, will lead to confusion, uncertainty, inconsistent application, legal challenges, and if ultimately adopted, increased burdens on state and local air agencies.

1. The Guidance Does Not Comport with the Regulatory Definition of "Begin Actual Construction"

The thrust of EPA's justification for its more expansive interpretation of allowable pre-permit construction activities is that the previous interpretation wrongly conflates an "emissions unit" with a "source." The "begin actual construction" definition, EPA argues, is intended to and should apply solely and strictly to construction of the physical "emissions unit" itself, because the term as it appears in the first sentence of the "begin actual construction" definition strictly limits the remainder of the definition.

NACAA does not share EPA's conviction that this is the most logical reading of the regulations. Rather, it appears that EPA is placing too much emphasis on the reference to

"emissions unit" in the first sentence, to the exclusion of the rest of the definition. In particular, the agency effectively disregards the definition's second sentence: "Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." This sentence serves to *elaborate and expand* on what is meant by the term "on an emissions unit," and the listed examples clearly go beyond the physical confines of the emissions units themselves, *i.e.*, the parts of a source that actually emit pollutants.

EPA's attempts to justify its interpretation are not convincing. Nowhere does it rationalize or provide examples of when and how "laying underground pipework" would be considered part of an emissions unit. In the one example given, EPA asserts that when a "permanent storage structure" is "not an emissions unit," its construction prior to issuance of an NSR permit would be permissible. But: "Conversely, no construction can be initiated, prior to permit issuance, where the storage structure in question is an emissions unit (*e.g.*, a petroleum or volatile organic liquid tank or vessel)."

EPA's example, rather than lending clarity, instead renders the phrase "construction of permanent storage structures" superfluous. If the only storage structures covered by the definition are "emissions units" themselves, there would be no need for EPA to list it as an example of construction of a permanent nature covered by the definition – because it is obvious that a petroleum storage tank, etc., is an "emissions unit." The same can be said for the rest of the second and third sentences. If the only construction that is prohibited prior to permit issuance is construction on the actual emissions units themselves, the second and third sentences serve no purpose.

The more reasonable interpretation of the phrase "on an emissions unit" – as elaborated by the second and third sentences of the definition – is that it extends to construction of a permanent nature not just on the emissions unit itself, but to installations closely related to or intended to accommodate the unit. That is, it is best understood to be in accordance with EPA's original interpretation of the definition. It is a basic canon of construction that all of the words in a statutory or regulatory provision should be given effect, if possible. The original, longstanding interpretation of "begin actual construction" abides by that precept. The new interpretation does not.

Two important points are at issue here. First, because EPA's new interpretation is a departure from the plain meaning of the regulatory language, it will sow confusion among regulators, the regulated community and the public and will likely be subject to legal challenge. Second, EPA's new interpretation constitutes a major departure from the original interpretation. EPA acknowledges this in the guidance, stating: "EPA recognizes that the interpretation at issue was a long-standing one and the Agency does not take lightly the decision to revise it."

Taken together, those two facts demonstrate that EPA should not attempt to change the meaning of (or "interpretation" of) "begin actual construction" through guidance, but rather, through notice-and-comment rulemaking. This should not be taken as a recommendation from

NACAA that such a rulemaking is desirable. But if EPA is intent on pursuing this significant change to the NSR program, notice-and-comment rulemaking is the proper way to accomplish it.

2. EPA's Failure to Articulate What Constitutes an "Emissions Unit" Compounds the Problems with the Draft Guidance

The draft guidance does not include any direction as to how the specific parameters of an "emissions unit" are to be ascertained for purposes of determining whether a given activity constitutes "construction . . . on an emissions unit." This analysis is left entirely to the permitting authorities to work through with their regulated sources. Considering that EPA's new approach to determining what pre-permit construction is permissible hinges entirely on how an "emissions unit" is defined, EPA's failure to provide guidance on this key issue is a serious concern.

The omission places state and local permitting authorities in the position of having to make case-by-case determinations without any criteria or record of past decision-making to rely upon. This will likely cause inconsistent implementation, both across states and within them, as the permitting authorities wrestle with where to "draw the line" as to what is part of an "emissions unit" and what is not. Further, it will demand significant agency staff time and resources and makes demonstration of compliance an uncertainty for the source.

Before finalizing this guidance, EPA should provide additional information that clearly articulates and provides detailed examples of what can and cannot be constructed prior to obtaining a NSR permit. This should start with a clear definition or explanation regarding what constitutes an "emissions unit" and how to delineate construction activities that are part of an emissions unit and activities that are not. As part of that clarification, EPA should explain under what circumstances the "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures" would and would not be considered separate from construction "on an emissions unit."

3. The Revised Interpretation Undermines Stakeholder Participation in the Preconstruction Permitting Process

State and local agencies are required to solicit input from members of the public and other stakeholders, including Federal Land Managers, as part of the NSR permitting process *before* a permit is issued. If a source owner or operator is allowed to engage in extensive construction activities on a facility prior to obtaining a permit, the ability of these stakeholders to influence the permitting process may be diminished. This may undermine the state and local permitting authorities' credibility and have an adverse effect on public participation.

At the very least, members of the public may come away convinced that their input is not taken into consideration in the determination of whether a facility can be constructed. This is not in accordance with the Clean Air Act, which ensures significant public participation, and it will lead to diminished trust in regulatory agencies and of public participation processes in general.

4. The "Equity in the Ground" Issue Remains a Legitimate Concern

A primary rationale behind EPA's original, longstanding interpretation of "begin actual construction" was that it may become more difficult for an air agency to deny issuance of a permit once a source has placed significant "equity in the ground." EPA argues in the draft guidance that this rationale is "of less concern today." On the contrary, EPA asserts, it is reasonable to imagine that the more "equity" a permit applicant places in the ground, "the less leverage, as a practical matter, that applicant would retain in the permitting process."

Based on the considerable experience and concerns of our members, NACAA disagrees with EPA's assessment. The "equity in the ground" issue remains a serious concern for state and local agencies. Once significant construction activities have begun on a facility, owners and operators become less willing and/or able to make any necessary design changes to implement the provisions of the NSR program, such as the inclusion of Best Available Control Technology emission controls and monitoring device installation. EPA's assertion in the guidance that any pre-permit construction is "at their own risk" does not obviate the ability of owners and operators to bring legal or political leverage to bear on the permitting decision. Many of the larger projects may involve public funds in terms of tax incentives, bonds, grants or other funds which could be put at risk should the source decide to proceed down this path.

Furthermore, if an owner or operator is allowed to construct before a permit application is even submitted to the state or local permitting agency, construction could commence before the agency is even aware of what type of emission units are planned for a project. This could potentially affect the overall emissions of the project. If owners or operators are reluctant to make design changes due to the amount of "equity in the ground," an opportunity to reduce emissions through design and operability improvements could be lost.

* * * * *

NACAA recognizes that EPA's new interpretation presented in the draft guidance document is not binding on state and local agencies that implement the NSR program under their own approved State Implementation Plans. Nevertheless, the revised interpretation will have significant impacts on all states. It will lead to significant inconsistencies between states in how the NSR program is implemented with respect to a fundamental part of the program. This is not desirable. We urge EPA to reconsider the guidance and, should it choose to pursue a revised interpretation of "begin actual construction," that it do so through notice-and-comment rulemaking rather than through a guidance document.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact either of us or Karen Mongoven of NACAA (kmongoven@4cleanair.org).

Sincerely,

Ursula Nelson
Pima County, AZ
Co-Chair
NACAA Permitting and NSR Committee

Ali Mirzakhalili
Oregon
Co-Chair
NACAA Permitting and NSR Committee

NEDA CAP CLEAN AIR PROJECT
The National Environmental Development Association's Clean Air Project

Counsel:
Ritts Law Group, PLLC

May 11, 2020

Via Electronic Mail
draft_permitting_guidance@epa.gov.
U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 22771
Attn: Mathias.Scott@epa.gov; Rao.raj@epa.gov
Santiago.Juan@epa.gov

RE: EPA Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations (Mar. 25, 2020)

Dear Gentlemen,

NEDA/CAP appreciates the opportunity to comment on EPA's draft NSR Guidance (Draft Guidance) interpreting the regulatory definition of "begin actual construction," a key term with respect to pre-construction permitting requirements in the Clean Air Act (CAA) New Source Review (NSR) regulations.[1] The agency's interpretation of "begin actual construction" is of critical importance to NEDA/CAP's members, which are American manufacturers operating across the United States and competing for market share in the global economy. Therefore, NEDA/CAP is appreciative of EPA's attention to the issue, and supports the agency's guidance because it restores clarity regarding the regulatory definition of "begin actual construction," which is essential given its role in the NSR program.

NEDA/CAP believes that the Draft Guidance contains a rigorous analysis of the regulatory definition of "begin actual construction" and that the revised interpretation of that definition arrived at in the Draft Guidance is not only reasonable, it is in fact compelled by the plain language of that definition. EPA's current interpretation of the phrase ignores the regulatory requirement that prohibited pre-permit activities must be "on an emissions unit" – or at least fails to give any independent meaning to that requirement recognizing the distinction between an "emissions unit" and a "major stationary source." Instead, EPA's current interpretation allows a pre-permit activity's cost and/or permanence to drive the application of the prohibition -- such that activities clearly distinct from "construction … on an emissions unit" are routinely found to be prohibited before the NSR permit is issued.

NEDA/CAP submits that the long-standing regulatory definition of "begin actual construction," as interpreted in the Draft Guidance, represents a reasonable exercise of EPA's discretion in implementing ambiguous provisions of the CAA. The revised interpretation in the Draft Guidance allows a variety of construction activities that are not "on an emissions unit"

[1] See 40 CFR § 52.21 (b)(11); 40 CFR § 51.166(b)(11); 40 CFR § 51.165(a)(1)(xv); 40 CFR part 51, Appendix S II.A17.

while reminding permit applicants that they incur the costs of such activities at a source at their own risk, should they not be issued an NSR permit (or issued a NSR permit that they do not agree with, or that would result in substantial rework of construction that has already taken place). Because the revised interpretation in the Draft Guidance does not allow physical on-site construction activities on an emissions unit before receiving an NSR permit, much less operation of an emission unit, the agency's interpretation in the Draft Guidance will not result in any increase in air pollution.

EPA's NSR permitting regulations state that no new major source or major modification to which the NSR requirements apply shall "begin actual construction" without an NSR permit. "Begin actual construction" is defined in the regulations as follows:

> *Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

As indicated in the Draft Guidance (at 13), the first sentence of this definition sets the parameters of those activities that are prohibited before a permit applicant receives a NSR permit: only activities that are (1) physical, (2) on-site, (3) construction activities, (4) on an emissions unit, and (5) are of a permanent nature are prohibited. Thus, the example activities in the second sentence of the definition are prohibited only if they meet all five criteria of the first sentence, with the key criterion being that the construction activity must be "on an emissions unit."

Activities not meeting the above criteria are not prohibited, regardless of whether, for example, those activities would be costly, significantly alter the site, are intended to be permanent in nature, or are intended to accommodate a new or modified emissions unit included in the proposed new source or modification. Therefore, as indicated in the Draft Guidance: the "installation of building supports and foundations" would be prohibited only if the building in question is itself an "emission unit;" and the "construction of [a] permanent storage structure[]" would be prohibited only if the storage structure is itself an "emission unit."

NEDA/CAP acknowledges that the Draft Guidance is not intended to provide detailed guidance on how the specific parameters of an emission unit are to be ascertained. However, in order to avoid confusion and promote uniformity, we believe that EPA should take the opportunity in the final guidance to (1) expressly state that a building that houses emission units is not itself an emissions unit; and (2) provide examples of other "accommodating installations," (i.e., installations that are not emissions units subject to the prohibition but are necessary to accommodate such emissions units) that may be constructed before an NSR permit is issued. Both of these concerns are already touched on in the Draft Guidance and go back to EPA's initial interpretation of the prohibition on pre-permit construction and merit additional discussion in the final guidance. As discussed in the Draft Guidance at footnote 11:

> One such "particular case" [questioning "where on the continuum from planning to operation … does a company … violate the PSD regulations if it has not yet received a PSD permit"] had been addressed by EPA two months earlier. *See* Memorandum, Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to Thomas W. Devine, Chief Air Branch, U.S. EPA Region I (October 10, 1978) (the October 1978 Reich Memorandum). Responding to a request for "guidance on the extent to which a company can legally construct, prior to PSD permit issuance, a building which will house both PSD-affected and non-PSD affected facilities," EPA said that, "*[i]n general, a structure which is to house independent facilities, some of which are subject to PSD and some of which are not, may be constructed before a PSD permit is issued only if the building is a necessary part of the PSD-exempt project and if it is in no way modified to specifically accommodate the PSD-affected facilities*." October 1978 Reich Memorandum at 1. In the specific case of certain "diesel engines . . . subject to PSD review," EPA continued that, "*[a]lthough drains, diesel footings, and various other installations may be considered part of the structure of the building," those elements of the project* "may not be constructed until the permit is issued if they are specific to the diesel engines."

Id. (emphasis added).

The October 1978 Reich Memorandum appears to indicate that whether or not a building or structure that will house emissions units may be constructed before a permit is issued depends on the whether those emissions units will be subject to PSD. Although the Draft Guidance indicates that pre-permit work, such as the "installation of building supports and foundations" is allowed "where the installation in question is not an emissions unit," *EPA should take the opportunity to clarify that a building or structure that will house emissions units is not itself to be considered to be an emission unit and therefore may be constructed prior to receiving an NSR permit*. For example, EPA should make clear that it is permissible to construct a manufacturing building that will eventually house assembly lines or stations (at which open-floor activities such as the hand application of cleaning solvents, adhesives and coating will occur), abrasive booths, paint booths, curing ovens, space heaters and/or other emission units. Only the physical on-site construction or installation of those "emissions units" themselves must await receipt of the final NSR permit.

The October 1978 Reich Memorandum, in its discussion of diesel engines that would be housed in a building, also appears to blur the line between the building and the emissions units by prohibiting the installation of "part[s]of the structure of building" "specific to" the emissions units (i.e., the diesel engines) including "drains and diesel footings." Although the Draft Guidance indicates that "an 'installation necessary to accommodate' the emissions unit at issue is *not* considered part of that emissions unit" and that "construction activities that may involve such 'accommodating installations' may be undertaken in advance of the source owner or operator obtaining a major NSR permit," *EPA should take this opportunity to clarify that allowed construction of accommodating installations includes many of the specific activities prohibited by earlier guidance*. For example, accommodating installations for a new emission unit such as a steam boiler would include (but not necessarily be limited to) the building or structure that houses the emission unit (e.g., a boiler house), utilities (e.g. gas, electricity, water) serving the

building or structure, and/or serving the emissions unit, auxiliary equipment such as (in the case of a boiler) feedwater pumps and water treatment systems, and the foundation the emission unit will be installed on.

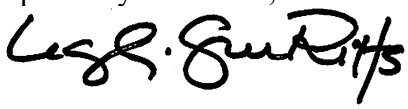
NEDA/CAP believes that these two overarching concerns can be addressed by EPA in the final guidance, and that the agency may do so without interfering with the existing guidance recounted by EPA in the Draft Guidance on determining the scope of any particular emission unit for purposes of NSR. For example, regardless of whether individual coating units, or instead an entire coating line, should be considered to be one or more "emissions units," there is no reason to consider the building in which these coating operations are/will be housed to be an emissions unit, and no reason to consider the utilities serving the building or coating units/line, or auxiliary non-emitting equipment serving the coating units/line, to be part of those emission units rather than accommodating installations.

****

In closing, NEDA/CAP submits that the guidance is urgently needed and that it should be finalized as soon as possible. Delays in construction occasioned by untethered and/or expansive, unpredictable interpretations of the NSR phrase "begin actual construction" harm businesses, their surrounding communities, and work forces. American industry competes with other nations' private and government-owned businesses for market share. EPA's and state permitting authorities' expansive, and sometimes unpredictable interpretation of the scope of prohibited pre-permit activities, can be directly related to lost business opportunities for innovative products, loss of market share in the world economy, American industry operations moving abroad, and uneven federal Clean Air Act enforcement. To resolve these inefficiencies, while continuing to protect air quality through the NSR programs, the Draft Guidance should promptly be finalized with the two additional clarifications requested herein.

Please don't hesitate to contact me by phone (703-966-3862) or email (LRitts@rittslawgroup.com) if you have questions about NEDA/CAP's comments or we can provide more information on them.

Respectfully submitted,



NEDA/CAP's Counsel

First Name: Michael
Last Name: Traynham
Organization: Nexsen Pruet, LLC
Email address: mtraynham@nexsenpruet.com
Comment:
To Whom it May Concern:

Our firm frequently represents parties with interests in the application of EPA Regulations, including 40 CFR § 52.21(a)(2)(iii), and in the degree of construction related activity that is permissible without obtaining a PSD permit. We are writing to provide comment in support of the EPA's Draft Interpretation of this provision on behalf of our clients and others similarly situation.

As the draft interpretation notes, EPA's historic interpretation of the phrase "begin actual construction" is inconsistent with the plain language of the regulation. The current interpretation, which limits permissible activities principally to site clearing and grading, planning, and ordering equipment and supplies, restricts permittees' ability to plan for and construct large capital improvement projects in an economically responsible manner. By contrast, the new draft interpretation provides permittees and applicants with the flexibility to better manage critical timelines and achieve potential cost savings, and thereby places them in a better position to ultimately achieve compliance with PSD requirements. While the draft interpretation appropriately maintains that the risks associated with all pre-permitting construction costs are on the permit applicant, the applicants are in the best position to determine the relative financial risks of proceeding with potentially costly construction which may require alteration or abandonment versus the risks associated with substantial delays in a multi-phased construction project. Under the current EPA interpretation of the phrase "begin actual construction," applicants have no such discretion and are subjected to the costs associated with delayed construction in most cases.

We believe the draft interpretation provides appropriate guidance given the plain language of the regulation, and we support the issuance of the memo as final guidance.

Very truly yours,
Michael S. Traynham

NORTH Dakota | Environmental Quality

Be Legendary.™

May 6, 2020

Mr. Juan Santiago
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
109 T.W. Alexander Drive
Mail Code C504-01
Research Triangle Park, NC 27709

Re: Interpretation of "Begin Actual Construction"

Dear Mr. Santiago:

The North Dakota Department of Environmental Quality (Department) appreciates the opportunity to provide comments on the draft *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations* (hereafter interpretation). The Department agrees with and fully supports the Environmental Protection Agency's (EPA) proposed interpretation of "begin actual construction".

In North Dakota, the winter weather limits the time available for certain construction activities such as site preparation, pouring concrete and general outdoors construction. This has caused delays in projects that lasted many months. The proposed interpretation will help alleviate these delays which can significantly reduce the cost of the project.

The proposed interpretation is very similar to rules the Department has adopted for its Minor New Source Review (NSR) program which have been in place since 1996. EPA has previously expressed concern that it would be "extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle". Therefore, EPA reasoned, "in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than have a 'white elephant' on our hands later on." The Department's experience with the Minor NSR program is that EPA's previously expressed fears are unwarranted. Our rules clearly state that beginning construction is at the owner's risk and have no impact on the Department's decision whether to issue a permit for the source. In the 24 years that we have been implementing the Minor NSR rules, no one has argued that a permit should be issued based on construction that has taken place and no "white elephants" have been created. The Department believes communication with the owners of a proposed source has prevented any such issues. The Department can generally warn the owner of any potential problems in obtaining a construction permit prior to any construction beginning. The Department believes the same will be true for its Prevention of Significant Deterioration (PSD) program if the proposed interpretation is adopted. The Department agrees that the proposed interpretation will not compromise our PSD permitting program since it must comply with the PSD rules. If the rules are not followed,

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Director's Office 701-328-5150
Division of Air Quality 701-328-5188
Division of Municipal Facilities 701-328-5211
Division of Waste Management 701-328-5166
Division of Water Quality 701-328-5210
Division of Chemistry 701-328-6140
2635 East Main Ave
Bismarck ND 58501

the permit is subject to objection by EPA or legal challenges by other parties. The owner of a proposed source would not want to risk challenges to the permit which would delay the project further.

In summary, the Department supports the proposed interpretation of "begin actual construction". The change in interpretation will not compromise the major NSR programs. We suggest this interpretation be written into the NSR regulations.

If you have any questions, please contact Tom Bachman of my staff at (701) 328-5188 or email tbachman@nd.gov.

Sincerely,

James L. Semerad
Director
Division of Air Quality

JLS/TB:saj
xc: L. David Glatt, Director DEQ

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Air Resources
625 Broadway, Albany, New York 12233-3250
P: (518) 402-8452 | F: (518) 402-9035
www.dec.ny.gov

May 11, 2020

Via Email
draft_permitting_guidance@epa.gov

U.S. Environmental Protection Agency

To Whom It May Concern:

The New York State Department of Environmental Conservation (Department) appreciates the opportunity to comment on the United States Environmental Protection Agency's (EPA) draft guidance memorandum entitled, *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*, dated March 25, 2020. The Department has some concerns with the guidance as proposed. EPA's introduction of a novel concept, labeled "installation necessary to accommodate" an emissions unit, is of particular concern. This concept lacks clear criteria and definition to guide individual states in making case-by-case determinations. Such a change to the New source Review (NSR) program may cause state programs to be implemented inconsistently across the nation. It could also foster emissions unit related construction prior to permit issuance, thereby adversely impacting the Clean Air Act's (CAA) NSR permit program and the state's ability to conduct a proper preconstruction review. Therefore, the Department, for the reasons detailed below, seeks clarity on the following portions of EPA's proposed guidance.

Under EPA's revised interpretation of "begin actual construction", an "installation necessary to accommodate" the emissions unit will no longer be considered part of that emissions unit, and those construction activities that may involve such "accommodating installations" may also be undertaken in advance of the facility obtaining an NSR permit. The proposed guidance relies on case-by-case determinations of what constitutes an emissions unit, which will lead to inconsistent application of the NSR regulations. For example, one state permitting authority may consider a building which will house an emissions unit to be separate from said emissions unit, while another state may consider the exhaust system for the building to be part of the emissions unit and, therefore, would not allow construction of the building prior to issuance of a permit. Accordingly, the Department recommends that EPA include specific examples in the final guidance document similar to those contained in the existing guidance clarifying what may or may not be constructed without a permit. Failure to provide unambiguous guidance will result in facility owners and operators in some states to be at a competitive disadvantage compared to similarly situated facilities in other states where the regulatory agency chooses to interpret EPA's new proposed term, "accommodating installation", more broadly.

The Department is also concerned that if this guidance is finalized and implemented as written, the public may perceive that facilities are allowed to construct emissions units prior to public input being taken into consideration as part of the permitting process. This may be viewed as a circumvention of the public participation requirements of the Department's Title V operating permit program. It may also give rise to the opinion that regulatory agencies are "in

league" with facility owners and operators and do not value what outside entities think about a proposed project. This negative perception would adversely affect a regulatory agency's ability to interact productively with the public and other stakeholders during the permitting process, contrary to the intent of the CAA's public participation requirements.

EPA should consider the possibility that permitting agencies in some jurisdictions will be hard-pressed to deny a permit after a developer has made ample investments in construction activities prior to permit issuance. EPA's overly-simplistic response to this "equity in the ground" concern is that facilities assume the risk by constructing without a preconstruction permit and by doing so, have diminished leverage and "…would be more motivated to accept proposals made by the permitting authority or by interested outside parties." While, in theory, a facility should be made to assume full risk of construction prior to permit issuance, the Department believes that "equity in the ground" may be leveraged to influence the permitting process in some jurisdictions. In fact, experience has demonstrated that facilities which have expended significant amounts of money on construction projects do not voluntarily acquiesce to the demands of a regulatory authority to significantly alter a newly constructed building. Rather, it may result in long-term conflicts and a drawn-out permitting process, especially in cases where public participation does not occur until after construction has been initiated.

The Department is always available to discuss potential projects with developers, to facilitate a productive and timely permitting process. We urge EPA to give due consideration to the points we raise and provide clearer direction that enables efficient permitting with appropriate public participation.

Thank you for your attention to and full consideration of these comments.

Sincerely,

Steven E. Flint, P.E.
Director, Division of Air Resources

May 11, 2020

Anne L. Idsal
Principal Deputy Assistant Administrator
Office of Air and Radiation
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue N.W.
Mail Code 6101A
Washington, D.C. 20460

Re: OGLETHORPE POWER CORPORATION COMMENTS ON DRAFT GUIDANCE ON "BEGIN ACTUAL CONSTRUCTION" UNDER THE NEW SOURCE REVIEW PERMIT PROGRAM

SUBMITTED ELECTRONICALLY TO EPA AT: draft_permitting_guidance@epa.gov

Oglethorpe Power Corporation ("Oglethorpe Power" or the "Corporation") submits the following comments to the Environmental Protection Agency ("EPA" or "Agency") on its draft guidance, entitled "*Begin Actual Construction" under the New Source Review Preconstruction Permitting Regulations* ("Draft Guidance").[1] This Draft Guidance sets forth EPA's proposed new interpretation of the regulatory term "begin actual construction" used in the existing regulations for implementing the New Source Review ("NSR") permitting program under the Clean Air Act ("CAA" or "Act").

Oglethorpe Power is one of the nation's largest power supply cooperatives, with more than $12 billion in assets serving 38 Electric Membership Corporations that collectively provide electricity to more than 4.2 million Georgia citizens. A proponent of conscientious energy development and use, the Corporation balances reliable and affordable energy with environmental responsibility and has an outstanding record of regulatory compliance. Oglethorpe Power owns,

[1] The Agency informally released for public review and comment the Draft Guidance on the EPA website at https://www.epa.gov/nsr/forms/draft-guidance-interpretation-begin-actual-construction-under-new-source-review. Comments must be submitted to the Agency on the Draft Guidance by May 11 through the following link on the EPA website: draft_permitting_guidance@epa.gov.

co-owns and/or operates thirty-one (31) electric generating units ("EGUs") in the State of Georgia. Its diverse energy portfolio includes natural gas, hydroelectric, coal, and nuclear generating plants, with a combined capacity of approximately 7,800 megawatts ("MW") (summer planning reserve capacity), as well as purchased power. Oglethorpe Power was established in 1974 and is owned by its 38 Member Systems. The Corporation is headquartered in Tucker, Georgia.

I. SUMMARY OF COMMENTS

As discussed in our comments below, Oglethorpe Power strongly supports the adoption of the Draft Guidance for the following reasons.

First, EPA's proposed new interpretation of the regulatory term "begin actual construction" is expressly authorized by the plain language of the current NSR regulations. This regulatory language authorizes owners and operators of major stationary sources to undertake a wide array of physical, on-site construction activities – even if they are permanent in nature – so long as those activities do not relate to the construction of an "emissions unit." By contrast, EPA's prior interpretation that imposed a blanket prohibition against all permanent construction activities at the facility site is inconsistent with the current regulatory text and thus lacked the requisite legal foundation for imposing such an absolute ban on all pre-permit construction activities of a permanent nature.

Second and more importantly, the adoption of EPA's new interpretation makes good policy sense. The process of obtaining NSR permits under the CAA is already a lengthy, complex, and costly undertaking. It can frequently take one to two years to obtain a NSR permit for construction of power generation facilities and other major energy infrastructure projects. Further extending this lengthy project development process by imposing an absolute ban on all on-site permanent construction activities unnecessarily perpetuates many of the burdensome impacts of permitting process. In particular, it can not only impede the expeditious development of these major energy projects but also drive sub-optimal decisions in the planning and development of these important energy projects. For example, the permitting burdens are so significant that they can discourage the replacement of existing EGU facilities with new, cleaner generating resources. In addition, it can result in sub-optimal permitting decisions that can limit the effectiveness and operational flexibility of those new, clean generating resources. Anything that the Agency can do to streamline or expedite this lengthy NSR permitting process should be an important objective of EPA and other federal agencies. To that end, we agree with EPA's decision to remove restrictions on on-site construction activities that are not directly related to the emissions units. These restrictions on pre-permitting constructions are not necessary to ensure the protection of air quality or environment, while their removal will allow the timely completion of important preparatory activities to ensure the efficient and cost-effective implementation of the construction project.

Oglethorpe Power urges EPA to take its comments, as presented below, into consideration as it moves forward with the finalization of the Draft Guidance on its new interpretation of the regulatory term "begin actual construction."

II. EPA'S NEW REGULATORY INTERPRETATION IS AUTHORIZED UNDER THE CURRENT NSR PERMITTING REGULATIONS.

The CAA requires a NSR permit for the construction of any new major stationary source or making a "major modification" to an existing major stationary source. The owners and operators of such stationary sources must therefore obtain a NSR permit prior to commencing construction of the new source or modification. Notably, the Act is silent on the issue of when physical on-site construction activities begin. As EPA itself recognized in interpretative guidance dating back to December 1978[2] and affirmed on multiple occasions thereafter,[3] nothing in the CAA specifies "where on the continuum" from initial "planning" to the ultimate "operation" a source owner or operator would run afoul of this statutory prohibition by initiating "construction" prior to receiving the required NSR permit.[4] Rather, Congress left to EPA's discretion the decision on where to draw the appropriate line between those physical on-site construction activities that require the issuance of a NSR construction permit and those activities that do not.

The Agency has addressed this precise issue by adopting through rulemaking specific federal rules that establish a clear line on where actual on-site physical construction begins for purposes of the NSR program. Those rules are set forth in the following provisions of the federal NSR implementing regulations.

First, the current regulations establish a pre-permitting construction ban by providing that no major new stationary source or modification subject to the NSR permitting requirements "shall begin actual construction without a permit."[5] Second, the regulations specify the types of construction activities subject to the NSR construction ban by defining the term "begin actual construction" as follows:

> *Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework, and construction of permanent storage structures.[6]

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[2] *See* Memorandum, from Edward E. Reich, EPA Director of Stationary Source Compliance Division, to EPA Enforcement Division Directors (December 18, 1978) ("1978 Reich Memorandum").

[3] *See e.g.*, Memorandum, from Edward E. Reich, EPA Director of Stationary Source Compliance Division, to Robert R. DeSpain, Chief Air Programs Branch for EPA Region VIII (March 28, 1986); Memorandum from John B. Rasnic, EPA Director of Stationary Source Compliance Division, to Bernard E. Turlinski, Chief Air Programs Branch for EPA Region III (May 13, 1993) ("1993 Rasnic Memorandum"); Letter, from John S. Seitz, Director of EPA Office of Air Quality Planning and Standards, to Charles W. Williams, Commissioner of the Minnesota Pollution Control Agency (December 13, 1995).

[4] Draft Guidance at page 14 (quoting from 1978 Reich Guidance).

[5] 40 C.F.R. § 52.21(i)(l). This regulatory provision is established for the federal Prevention of Significant Deterioration ("PSD") program for new and modified sources located in attainment areas meeting national ambient air quality standards for regulated criteria air pollutants. For purposes of simplicity, these comments cites only to the relevant provisions in the federal PSD regulations that are codified at 40 C.F.R. §52.21, although EPA has established NSR regulations that are essentially identical for nonattainment areas and state implementation of the federal NSR program. *See* 40 C.F.R. §51.166; 40 C.F.R. §51.165; Appendix S of 40 C.F.R. part 51. Reference to the particular PSD regulatory provision in our comments shall be deemed to apply also to parallel regulatory provision in these other federal NSR regulations.

[6] 40 C.F.R. § 52.21(b)(11).

Under this regulatory definition, the physical on-site construction activities subject to the NSR construction ban are expressly limited to only those activities that are undertaken "on an emissions unit." The regulations, in turn, define "an emissions unit" as "any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act."[7] This means that the construction ban does not apply to other physical on-site construction activities – even if they are permanent in nature – if those activities are not undertaken "on an emissions unit." Notable examples of construction activities not subject to the construction ban include excavation activities (such as blasting, removing rock, and backfilling) as well as the construction of retaining walls, ancillary buildings and other permanent structures at the facility site that do not emit or have the potential to emit an air pollutant regulated under the CAA.

Finally, it should be noted the regulatory definition of "begin actual construction" provides a non-exclusive list of physical on-site construction activities that are subject to the NSR construction ban. However, each of the activities enumerated in the definition pertains to only the construction of building supports, foundations, pipework, and permanent storage structures "on an emissions unit." As a result, the current NSR regulations allow for the construction of these and other permanent structures and facilities without a NSR permit in those cases where they are not reasonably considered to be part of the emission unit.

Oglethorpe Power supports EPA's adoption of this interpretation of the existing NSR regulations. It properly limits the construction ban to those physical on-site activities that involve the construction of an emissions unit and thereby gives full effect of the regulatory language in the definition of "begin actual construction." By contrast, EPA's prior interpretation of its regulations would read key words out of the regulatory text (specifically the phrase "on an emissions unit") because it would preclude source owners or operators, prior to obtaining a NSR permit, from undertaking any and all on-site activity of a permanent nature – even in the case of those construction activities that are separate from and unrelated to the construction of the emissions unit.

III. EPA'S NEW REGULATORY INTERPRETATION IS JUSTIFIED BY IMPORTANT AND COMPELLING POLICY CONSIDERATIONS.

In addition to being the correct reading of the current NSR permitting regulations, EPA's proposed new interpretation makes good policy sense for the following reasons.

First and foremost, the Draft Guidance – if adopted – will not pose any significant adverse risks to air quality or the environment. EPA (and state permitting authorities as appropriate) will still be required to administer all of the current NSR permit requirements applicable to new major stationary sources and modifications subject to NSR regulation. New and modified major sources will still be required to install state-of-the art emissions control systems for limiting new emissions,[8] perform all necessary air quality modeling for demonstrating the attainment and

[7] 40 C.F.R. § 52.21(b)(7).

[8] Specifically, sources must install pollution control technology meeting "best available control technology" (BACT) for those air pollutants subject to PSD permit review. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j). By contrast, for those air pollutants subject to nonattainment-NSR review, sources must install control technologies

maintenance of national ambient air quality standards,[9] securing emissions offsets for assuring reasonable further progress in nonattainment areas,[10] and meeting all other applicable requirements for enhancing the air quality and protecting the environment under the NSR program. Nor does this new interpretation interfere with the implementation of the public participation and other administrative requirements applicable under the NSR program. Notice and the opportunity to comment will still be provided to the general public[11] and there will continue to be an opportunity to seek review of the final NSR permit issued by the permitting authority under applicable federal and state laws.

Second, the Draft Guidance will not impair or otherwise compromise the many technical and regulatory decisions that are required for issuance of NSR permits. In the Draft Guidance, the Agency noted that its prior policy rationale for imposing an absolute ban on undertaking any on-site construction activities of a permanent nature was based on the concern that source owners or operators would gain leverage in the permitting process if they were allowed to engage "in costly and permanent on-site construction activities prior to receiving an NSR permit."[12] To avoid these types of "equity arguments" during the permitting process, EPA reasoned that the better course was to impose an absolute ban on all on-site permanent construction activities so that a permitting authority will not be "placed in the very difficult position" of having to foreclose the use of the completed portion of a construction project.[13] Such an outcome could occur if it becomes necessary for the permitting authority to deny the permit application or impose onerous permitting conditions on the proposed new source or modification.

The Corporation believes that this concern is misplaced. We agree with the Agency's determination that "it is implausible that state and local permitting authorities, with some 40 years of experience in implementing the NSR preconstruction permitting program, would allow their judgment to be compromised in making permitting decisions by any "equity in the ground" arguments that could potentially be advanced by permit applicants who have "previously expended time, money, and other resources in undertaking on-site construction activities of a significant nature."[14] The outcome of the NSR permitting process should not be any different because a source undertakes construction activity on those portions of a facility that are not emissions units prior to obtaining a NSR permit for the construction of, or modification to, an emissions unit. For example, permitting authorities must still set performance standards based on "best available control technologies" ("BACT") for new emissions units located in attainment areas based on the BACT analysis contained in the NSR permit applications without regard to the preparatory activities conducted facility sites.

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that achieve emissions reductions to the greatest extent possible, which is referred to as "the lowest achievable emissions rate" (LAER). CAA § 173(a)(2), 42 U.S.C. § 7503(a)(2); 40 C.F.R. § 51.165(a)(1)(xiii).

[9] Applications for a PSD permit must include an analysis of ambient air quality that the new source or modification would affect, including each pollutant emitted in significant amounts or a significant net emission increase (for a modification) as well as pollutants for which there are National Ambient Air Quality Standards (NAAQS) and for those for which no NAAQS has been set. *See* CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(m).

[10] In particular, nonattainment-NSR regulations include requirements for the source to obtain offsetting emissions reductions on at least a one-to-one basis. S*ee* CAA § 173(c), 42 U.S.C. § 7503(c); 40 C.F.R. § 51.165(a)(9).

[11] The NSR permit requirements include extensive public notice and comment procedures that are set forth at 40 C.F.R. § 52.21(q).

[12] Draft Guidance at page 18 (quoting 1978 Reich Memorandum at page 2).

[13] Draft Guidance at page 18 and footnote 31 (quoting from 1993 Rasnic Memorandum).

[14] Draft Guidance at page 19.

Third, the adoption of the Draft Guidance will help to expedite the development of major new construction projects while still achieving the goals of the NSR program to enhance air quality and protect the environment. The process of obtaining NSR permits under the CAA is already a lengthy, complex, and costly undertaking. It can frequently take one to two years to obtain a NSR permit for construction of fossil-fueled power generation facilities and other major energy infrastructure projects. In the case of electric cooperatives such as Oglethorpe Power, the timeline for project development can be lengthened by the process required for securing funding through the Rural Utilities Service ("RUS") at the U.S. Department of Agriculture. These additional delays can be significant when the RUS funding application process in turn triggers environmental reviews under the National Environmental Policy Act. Further extending this lengthy permitting process by imposing an absolute ban on all on-site permanent construction activities unnecessarily perpetuates many of these burdensome impacts of the project development process.

And finally, the timely completion of these construction activities can take on an increased importance in those cases where the issuance of a final permit is being delayed by a few outstanding technical issues required for finalizing the permit. Similar delays can result in cases where the legal effectiveness of the permit is stayed due to legal challenges raised to EPA's Environmental Appeals Board or comparable state process for permit appeal and administrative hearing.[15] To help minimize the effects of these permitting delays, it is critically important for EPA to allow source owners and operators to undertake many construction activities of a permanent nature on non-emissions units at the facility site prior to issuance of a final NSR permit.

Furthermore, the imposition of an absolute construction ban not only impedes the expeditious development of these major energy projects but also drives sub-optimal decisions in the planning and development of these important projects. One notable example is that the permitting burdens can be so significant that they can have the effect of discouraging the replacement of older, existing fossil-fueled EGU facilities with newer, cleaner and more efficient fossil-fueled generating facilities. In addition, it can result in source owners and operators being forced to make sub-optimal permitting decisions that can limit the effectiveness, performance, and operational flexibility of those new, clean generating resources.

In light of the preceding policy considerations, the Corporation strongly supports adoption of the Draft Guidance as proposed. Anything that the Agency can do to streamline or expedite this lengthy NSR permitting and project development process should be an important objective of EPA (as well as other federal agencies). To that end, Oglethorpe Power agrees with EPA's decision to remove restrictions on on-site permanent construction activities that are not directly related to the emissions units at the facility site. These construction restrictions are not necessary to ensure the protection of air quality or environment, while their removal will allow the timely completion of important preparatory activities and the construction of ancillary structures at the site to ensure the efficient and cost-effective implementation of the construction project.

[15] *See e.g.*, 40 C.F.R. §124.15(b)(3) (providing that a NSR does not take legal effect if there is an administrative appeal to the Environmental Appeals Board is requested under §124.19). States establish their own administrative review procedures in the cases of NSR permits issued by the state pursuant to a fully EPA-approved NSR permit program.

IV. CONCLUSION

Oglethorpe Power appreciates the opportunity to submit comments on the Draft Guidance regarding the interpretation of the term "begin actual construction" in the federal NSR regulations. For reasons discussed above, we believe it is appropriate for EPA to issue final guidance confirming that the current NSR regulations already allow source owners and operators to undertake any and all permanent construction activities at a facility site, so long as those activities do not relate to the construction of an "emissions unit." This interpretation is expressly authorized by the plain language of the current NSR regulations and expedites the project development process without posing any risks to air quality or the environment. Should you have any questions about these comments, please do not hesitate to contact me at (770) 270-7740 or toni.presnell@opc.com).

Sincerely,

Toni Presnell
Vice President of Environmental Affairs
Oglethorpe Power Corporation

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

May 11, 2020

U.S. Environmental Protection Agency
Air and Radiation Docket and Information Center
Mail code: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations Guidance Memorandum (March 25, 2020)

Dear Administrator Wheeler:

The Pennsylvania Department of Environmental Protection (DEP) appreciates the opportunity to provide comments on the United States Environmental Protection Agency's (EPA) proposed Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations Guidance Memorandum dated March 25, 2020.

EPA is proposing to reinterpret the term "Begin Actual Construction" as follows: A source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – ***provided*** that those activities do not constitute physical construction ***on an emissions unit***, as the term is defined in 40 CFR § 52.21(b)(7). Further, under this revised interpretation, an "installation necessary to accommodate" the emissions unit at issue is ***not*** considered part of that emissions unit, and those construction activities that may involve such ***"accommodating installations"*** may be undertaken in advance of the source owner or operator obtaining a major NSR permit.

The term "begin actual construction" is currently defined in 40 CFR § 52.21(b)(11) to mean, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

Prior to this draft revision, EPA considers almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of "actual construction," even where that activity does not involve direct construction "on an emissions unit".

DEP believes that the concept of allowing a source owner or operator to undertake certain on-site activities prior to receiving a major NSR permit is acceptable in the sense that it will speed up the overall process of a major project. In fact, DEP has already allowed certain activities which do not involve direct construction of an emission unit to be taken prior to obtaining a plan

approval authorization for non-major NSR sources.

One of the possible concerns that might arise for major NSR sources is that DEP's regulations (25 Pa Code § 127.1) require that new sources must control emissions to the maximum extent, consistent with the best available technology (BAT) determined by DEP at the time of plan approval issuance. This is to ensure that the source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards. This is a risk that the company or operator has to accept should the need to redo or re-design certain parts of a project be required as a result of the BAT determination by DEP.

Another concern is under 25 Pa. Code 127.44, DEP is required to publish proposed plan approvals in the Pennsylvania Bulletin for public comment, as well as give notice to EPA, any state within 50 miles of the facility, and any state whose air quality may be affected and that is contiguous to Pennsylvania for project at major sources. If there is public opposition to a proposed facility and the owner/operator begins to build it before obtaining the NSR permit, the public may lose trust that their input will not have any impact on the permitting decision.

Lastly, although DEP appreciates the opportunity to comment, a more transparent approach of soliciting comments through formal action on the Federal Register is preferred, instead of the EPA seeking comments on draft interpretations through the EPA website.

Thank you for your consideration in this matter. Should you have questions or need additional information, please contact Viren Trivedi, Bureau of Air Quality, at 717.787.4325 or vtrivedi@pa.gov.

Sincerely,

Patrick McDonnell
Secretary

First Name: Peter
Last Name: Julovich
Organization: Local City Government
Email address: pjulovich@gary.gov
Comment: Does the guide allow construction control emission unit to be construction when the unit is considered an integral process.

DONNA H. CARVALHO
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May 11, 2020

Mr. Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Mail Code 6102T
Washington, DC 20460

Submitted electronically via EPA website instructions

RE: Comments for Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Dear Administrator Wheeler:

Phillips 66 is a diversified energy manufacturing and logistics company. It processes crude in its refineries and transports, stores, and markets fuels and products globally. More specifically, Phillips 66 owns and/or operates several major and minor sources within the United States including twelve refineries and numerous terminals and fuel dispensing facilities. Phillips 66 facilities are subject to a variety of New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPs). Additionally, its refineries have sought and obtained major source permits including Prevention of Significant Deterioration (PSD) permits from a variety of permitting authorities. Phillips 66 appreciates the opportunity to comment on EPA's March 25th, 2020 draft guidance entitled, "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations".[1]

Phillips 66 Company ("Phillips 66") agrees that adoption of EPA's clarified interpretation of "begin actual construction" under the new source review preconstruction permitting regulations is important and necessary. EPA's historical interpretation considers almost every physical on-site construction activity that is of a permanent nature to constitute the "beginning of actual construction," even where that activity does not involve construction "on an emissions unit." The historical interpretation precludes source owners/operators from engaging in preparatory activities they might otherwise desire to undertake before obtaining a NSR permit. Further, the historical interpretation has been subject to unequal implementation by permitting authorities.

[1] Memorandum from Anne L. Idsal, Principal Deputy Assistant Administrator to Regional Air Division Directors, titled, "Interpretation of 'Begin Actual Construction' Under the new Source Review Preconstruction Permitting Regulations" (March 25, 2020) (hereinafter "Draft Begin Actual Construction Memo"), page 21.

Phillips 66 agrees that only construction on "the emissions unit" should be prohibited, consistent with the existing regulatory language which states that pre-permit precluded activities are activity (1) that is "physical" in nature; (2) that is undertaken "on-site"; (3) that involves "construction"; (4) that is "on an emissions unit"; and (5) that is of a "permanent nature." If all criteria are not met, the construction is allowed.

To make this draft interpretation as effective as possible, EPA cannot simply allow permitting authorities the unfettered ability to define an "emission unit." As discussed in further detail below, if the permitting authority can simply state that a large major source such as a petroleum refinery or "petroleum refinery process unit" is "the emissions unit," then the rest of EPA's guidance can become meaningless. Further, there is concern that various permitting authorities will be inconsistent with their interpretations and industries will be treated differently across the United States.

Allowed Construction Activities

The draft guidance indicates that in some situations the "precluded" activities listed in the 1993 Rasnic Memorandum[2] and the 1995 Seitz Letter[3] – i.e., "blasting," "excavation," "backfilling,"– do not even meet the regulatory definition of the term "construction" itself. Whether one applies the 1978 definition of construction ["fabrication, erection, installation, or modification of a source." § 52.21(b)(7) (1978); 43 FR 26404] or the existing definition ["any physical change or change in the method of operation (including fabrication, erection, installation, demolition or modification of an emission unit that would result in a change of emissions", 40 CFR 52.21(b)(8)], there are a variety of preparation activities that can and should be allowed that are not part of the fabrication of an emissions unit. Nevertheless, EPA has historically precluded these activities and has alleged that these activities violated the PSD rules.

For example, the following allegation was made by an EPA Regional office in the last decade where nothing other than excavation and laying of gravel was alleged:

> On *[DATE]*, representatives from EPA inspected the site where [*NAME OF THE COMPANY*] is proposing to construct a new [*NAME OF THE UNIT*] as part of the [*NAME]* project. EPA observed certain activities at the site demonstrating that [*COMPANY NAME*] had begun actual construction prior to obtaining an effective permit. **These activities included, but were not limited to, excavation and laying gravel.**

Excavation and laying gravel are a typical activity that may occur in preparation for the installation or fabrication of an emissions unit. However, if in fact, no emissions unit is ever

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[2] Memorandum, John B. Rasnic, Director, U.S. EPA Stationary Source Compliance, Office of Air Quality Planning and Standards, to Bernard E. Turlinski, Chief, Air Enforcement Branch, EPA Region III (May 13, 1993) (the 1993 Rasnic Memorandum).

[3] Letter from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards, to Charles W. Williams, Commissioner, Minnesota Pollution Control Agency (December 13, 1995) (the 1995 Seitz Letter).

built, there are no emissions from this activity. This is the type of activity that would now more clearly be and should have always been allowed.

As noted in EPA's discussion, the original rationale for EPA's flawed historical interpretation was the Agency's concern that it would be "extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle."[4] This concern has always been illusory as it has been a longstanding principle that even the limited amount of pre-construction activity that was allowed under the flawed interpretation was at the source's own risk. EPA is clearly not removing this "at risk" condition, but rather broadening the extent of allowable preconstruction activities that are consistent with the actual definition of "begin actual construction." Furthermore, the PSD program has now been in existence for over 40 years and existing major source owners can certainly be expected to know and understand the risk they may be taking when they elect to proceed with preconstruction activities that are not otherwise allowed.

Under EPA's draft guidance, source owners or operators, at their own risk, would be able to "undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction on **an emissions unit** *(emphasis added)*."[5] EPA clarifies that owners and operators may construct installations necessary to accommodate the emission unit but not begin actual construction on the emission unit. The draft guidance notes, "A source owner or operator is permitted to undertake a physical on-site construction activity, even if it is of a permanent nature, without having first obtained an NSR preconstruction permit, provided that the activity does not involve construction 'on an emissions unit.'"[6]

EPA's draft guidance is consistent with the one court ruling that has squarely addressed this issue. In *Hempstead County Hunting Club vs. Southwestern Electric Power Company*, 2008 U.S. Dist Lexis 54821, the Court found that the following activities were not "actual construction":

- site clearing,
- site grading,
- ordering of equipment and construction materials,
- installing storage and laydown areas for storage of equipment and construction materials,
- storing the equipment and materials on site, installing construction and office trailers,

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[4] Memorandum, Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to U.S. EPA Enforcement Division Directors, Regions I-X (December 18, 1978) (the December 1978 Reich Memorandum).
[5] Draft Begin Actual Construction Memo, pg. 2
[6] *Id.*, pg. 12.

- installing break trailers,
- creating access roads in and on site, and
- creating a detention pond to control surface water runoff from the construction site.

The court found that these activities were neither permanent nor an integral part of the PSD source. The court distinguished these activities from initiation of physical onsite construction activities **on an emission unit** which are of a permanent nature (*emphasis added)*. What an owner or operator could not do per 40 CFR 52.21(b)(11) was to "begin actual construction," which the Court found, means to install building supports or foundations, construct any retaining walls, do any paving, lay underground pipe work, or construct any permanent storage structures of the actual emission unit.

In 2010 in *United States v. Xcel Energy, Inc*., 759 F. Supp. 2d 1106 (2010), the Court referenced the *Hempstead* ruling and noted, "[I]n order for an activity to be considered 'actual construction' and, thus, prohibited without a PSD permit, it must 1) be physical; 2) occur on-site; 3) be on an emissions unit; and 4) be permanent in nature." EPA's draft interpretation is also consistent with this ruling in that the new interpretation also prohibits construction "on an emissions unit."

In addition to the items clearly allowed under *Hempstead*, the new EPA guidance also allows activities to accommodate a given emission unit. Owners or operators, at their risk, would now also be able to prepare electrical and other utility connections, build retention areas, prepare laydown yards, construct buildings that will house emissions units where the emissions unit is not installed until permit issuance, build pilings, footings, and foundations, reroute utilities at the project site, and other similar activities. As the permitting process can take several months, EPA's draft interpretation allows owners and operators at their risk to begin activities that are not related to a specific emissions unit.

EPA's draft guidance is an important improvement over the existing guidance that limits actions that do not even constitute construction on "an emissions unit."

<u>Definition of an Emissions Unit</u>

Given that EPA's draft guidance more clearly allows preparatory work and now also allows pre-permit work that would accommodate an emissions unit, a better understanding of what constitutes an emissions unit is essential. If the determination of what constitutes an "emission unit" is left entirely to state and local or even regional EPA permitting authorities, we believe that jurisdictions will differ and there will be continued confusion.

As the Agency notes, current regulatory language defines an "emission unit" as "any part of a stationary source that emits or would have the potential to emit any …regulated NSR pollutant..." 40 CFR § 52.21(b)(7). EPA offers two paths for interpreting "an emission unit." First, a permitting authority can look to the NSPS or NESHAP definitions of an "affected

facility". Alternatively, a permitting authority can consider the "interconnectedness" of the activities being permitted. Phillips 66 has concerns with both approaches, but particularly with the "interconnectedness" argument as it can render an entire facility or individual emission sources that are physically separate, a single "emissions unit" because they have interconnected operations or are connected by piping.

Phillips 66 requests that EPA define an emission unit using a common-sense approach. If a piece of equipment (a heater, a storage vessel, a parts washer, etc.) will have emissions when it is operated, it is an emissions unit whether construction of that unit is a stand-alone project or part of a larger project. This seems both obvious and clear. As noted below, in many cases (though not all cases) this recommended definition of an emission unit is also consistent with the definition of an affected facility for NSPS or NESHAP regulations.

In contrast, reliance on an "interconnectedness" approach will lead to unintended and overreaching consequences, including conflation of "emissions unit" and "stationary source," which itself can render the guidance EPA proposes for "begin actual construction" meaningless. Further, reliance on "interconnectedness" runs contrary to the same principles recently found to be inaccurate for project aggregation. Lastly, EPA's Limetree Bay Terminals/SPM example[7] is an outlier with unique facts, and it should not be used as the poster child for relying on "interconnectedness" – rather, the slippery slope of "interconnectedness" should be top-of-mind for those agencies implementing this PSD guidance, not the one outlier case where it may have made some sense.

As noted in 40 CFR 52.21(b)(7), an emission unit **is part of a stationary source** *(emphasis added)*. When describing the "interconnectness" test (and notwithstanding its statements to the contrary), EPA's guidance implies that a permitting authority can designate a group of individual air emission sources as "the emissions unit" if the new or modified emission source for which a permit will be sought has "interconnectedness" with other sources. To rely on an "interconnectedness" approach can lead to situations where preparatory activities for installing or modifying an emission source such as a heater, boiler, or sulfur recovery unit can never occur pre-issuance of the permit because the "emissions unit" has been defined by the permitting authority as the entire process area or even the entire site. While EPA warns permitting authorities against invoking an overreaching definition of an "emissions unit," all preparatory activities on the site will be considered to be construction of the overbroadly defined emission unit. Under this scenario, the "emissions unit" and the "stationary source" become one and the same and the definition of an emissions unit is rendered meaningless thereby restricting the benefits of the improved EPA draft guidance. The common-sense interpretation of an emissions unit is a single piece of equipment that has emissions. To define an emissions unit in any other manner leads to some of the same types of problems EPA's previous interpretations presented.

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[7] Id. at pg. 21.

Phillips 66 is further concerned about the "interconnectedness" approach because it uses some of the same principles as were recently found to be inaccurate for project aggregation. Under EPA's recent aggregation statement,[8] projects (as opposed to emission units) are to be aggregated for PSD evaluation when they have a substantial relationship. A substantial relationship between projects is fact dependent and is determined by evaluating the technical and economic interdependence of the projects.[9] In clarifying that projects are **not** "substantially related" merely because they occur at the same plant, EPA specifically noted that earlier guidance (as provided in "the 3M memo")[10] which found that two projects could not be presumed to be independent "given the plant's overall basic purpose" *(and were therefore interdependent) (emphasis added)* could be interpreted to imply that almost any activity is related to any other activity at that source simply because they are both capital investments and support the company. Now, within the "begin actual construction" guidance, EPA seems to allow permitting authorities to make the same overreaching and broad determination as to what is an "emissions unit." The following draft guidance language demonstrates how EPA determined that a single point mooring (SPM) could be part of the same emissions unit as an onshore facility under an "interconnectedness" approach:

> EPA reasoned that the SPM "would not change the nature of the pollutant-emitting activity occurring at the existing marine terminal" and that it would be "physically connected to the existing marine loading terminal by way of an underwater piping system and will be completely integrated with the loading and storage operations at the existing terminal. Consequently, the SPM and current marine terminal appear to share the same interconnectedness that EPA previously found persuasive in its analysis of semiconductor fabs...."[11]

Phillips 66 is concerned that EPA's reasoning noted above appears to be at odds with EPA's expectation that permitting authorities not take an unduly broad or unreasonable view of the scope of an emissions unit as provided below:

> EPA expects that sources will continue to work with their permitting authorities to determine the scope of an "emissions unit" for the purpose of evaluating whether a particular activity constitutes "construction . . . on an emissions unit" within the meaning of 40 CFR § 52.21(b)(11). As illustrated above, the definition of "affected facility" and/or "process unit" under a relevant NSPS or NESHAP can occasionally provide useful direction for this analysis. Nevertheless, in making this determination, a source or permitting authority would be acting contrary to the purpose and intent of EPA's interpretation of "begin actual construction" set forth here were that source or permitting

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[8] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation Reconsideration, 83 Fed.Reg. 57324 (November 15, 2018)
[9] *Id.* at 57327, col. b.
[10] Memorandum from John B. Rasnic, Director, Stationary Source Compliance Division, OAQPS, to George T. Czerniak, Chief, Air Enforcement Branch, EPA Region 5, titled, ''Applicability of New Source Review Circumvention Guidance to 3M— Maplewood, Minnesota'' (June 17, 1993) (hereinafter ''3M Memorandum'').
[11] Draft Begin Actual Construction Memo" page 21.

> authority to take an unduly broad or otherwise unreasonable view of the scope of an emissions unit that fails to recognize a distinction between an emissions unit and the major stationary source.[12]

Finally, it is not entirely clear when the designation of the "emissions unit" under the "interconnectedness" approach will occur. If the source owner believes that his emission source (i.e., a heater) is an "emission unit" based on past experience or an NSPS or NESHAP source definition and begins preparatory work prior to obtaining a permit, but the relevant permitting authority determines the heater to be part of a larger source-based "emission unit," the owner may face enforcement. While this and previous guidance states that such preparatory activities are always at risk, the draft guidance is also intended to make EPA's position clearer and inform a source owner or operator as to which actions are allowed.

Phillips 66 supports the use of NSPS or NESHAP source definitions with some caveats. Many of the NSPS or NESHAP standards are written with very specific definitions of what constitutes an "affected facility." For example, NSPS Subpart Ja notes that it applies to the following affected facilities in petroleum refineries: fluid catalytic cracking units (FCCU), fluid coking units (FCU), delayed coking units, fuel gas combustion devices (including process heaters), flares and sulfur recovery plants. Each of these affected facilities are arguably standalone emission units. Similarly, NESHAP Subpart CC and UUU specifically apply to petroleum refining process units and catalytic cracking units, catalytic reforming units and sulfur recovery units respectively. Phillips 66 believes these individual units are the appropriate "emission unit." Therefore, where Phillips 66 might be constructing a new coker and modifying an existing coker unit, the project has two emission units and not a "coker area" emission unit.

Phillips 66 is aware that other NSPS and NESHAP standards, such as the referenced NESHAP BBBBB for Semiconductor Manufacturing state that it established national emission standards for hazardous air pollutants from semi-conductor "process units." This standard (40 CFR §63.7195) does not list actual units but different types of processes. Phillip 66 is concerned that where the NSPS or NESHAP standard is not explicit, the "emission unit" may again be determined to be something that is more akin to an entire plant or stationary source.

Conclusion

In conclusion, Phillips 66 agrees that adoption of EPA's clarified interpretation of "begin actual construction" under the new source review preconstruction permitting regulations is important and necessary. Phillips 66 agrees that only construction on "the emissions unit" should be prohibited prior to obtaining a PSD permit. This is consistent with the existing regulatory language which states that pre-permit precluded activities is activity (1) that is "physical" in nature; (2) that is undertaken "on-site"; (3) that involves "construction"; (4) that is "on an emissions unit"; and (5) that is of a "permanent nature." If all criteria are not met, the construction is allowed. Given that EPA's draft guidance more clearly allows preparatory work

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[12] *Id.* At 21-22.

and now also allows work that would accommodate an emissions unit, a better understanding of what constitutes an emissions unit is essential. It is Phillips 66's position that "an emissions unit" is a discrete piece of equipment which will have emissions. Phillips 66 is very concerned that permitting authorities will define the "emission unit" so broadly as to make it indistinguishable from "the site" or the "stationary source" without clearer EPA guidance. Phillips 66 requests that EPA provide more definitive guidance in this area consistent with these comments and not leave it solely to state and local or even regional EPA permitting authorities to determine what constitutes an emissions unit as we believe that jurisdictions will differ and there will be continued confusion.

Respectfully submitted,

Donna H. Carvalho

Donna H. Carvalho

PLASTICS Comments on EPA's 'Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations'

The Plastics Industry Association (PLASTICS) appreciates this opportunity to provide comment and seek clarification on EPA's 'Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations' (Draft Guidance) as issued on March 25, 2020.

PLASTICS, formerly SPI, is the only organization that supports the entire plastics supply chain, representing nearly one million workers in the $451 billion U.S. industry. With member companies having sites subject to new source review (NSR) permits, and fostering continual improvement in environmental performance in the plastics industry, PLASTICS has a specific interest in this guidance document as it affects members' building projects in the U.S.

We appreciate EPA's undertaking to address the "overly and unnecessarily restrictive" interpretation of "begin actual construction" and offer the following:

1. **We support EPA's March 2020 Draft Guidance revised interpretation of "begin actual construction" defined in 40 CFR 52.21(b)(11)**, such that "a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – ***provided*** that those activities do not constitute physical construction ***on an emissions unit***, as the term is defined in 40 CFR § 52.21(b)(7)." We agree with the agency's position that 'an "installation necessary to accommodate" the emissions unit at issue is *not* considered part of that emissions unit,' and that 'construction activities that involve an "accommodating installation" may be undertaken in advance of the source owner or operator obtaining an NSR permit.' The Draft Guidance (page 13) points out that the definitions first sentence, at 40 CFR § 52.21(b)(11), sets forth five distinct criteria that, collectively, identify the type of activity that a source owner or operator is precluded from undertaking prior to obtaining an NSR permit – '*i.e.*, activity (1) that is "physical" in nature; (2) that is undertaken "on-site"; (3) that involves "construction";[21] (4) that is "on an emissions unit";[22] *and* (5) that is of a "permanent nature."' We agree that an activity will constitute the "beginning" of "actual construction" only if it meets all five of these criteria.

   As noted in the Draft Guidance, stakeholders had identified the definition of "begin actual construction" as an area for improvement in response to Executive Order 13777, issued in February 2017. Comments in EPA's docket for Evaluation of Existing Regulations (https://www.regulations.gov/docket?D=EPA-HQ-OA-2017-0190) noted:
   - conflicting EPA and State guidance on the meaning of "begin actual construction"
   - Notices of Violation (NOVs) have been issued by EPA for activities only peripherally related to an emissions unit
   - preconstruction, pre-permit activities that are not "on an emission unit" can help reduce project delays (e.g., in areas with severe weather)

- any allowed preconstruction, pre-permit activities would begin at the project proponent's own risk (time, cost, etc.) and with their understanding of the possibility of changes (upon review of the permit application) or complete denial of the permit
- this is reasonable where it remains obvious that the source for which a permit is being sought cannot yet operate or "emit"
- budgeting process can make it very difficult to plan and budget for construction under the current circumstances
- some states have already incorporated such allowances, typically in minor source permitting programs
- allowable activities should include, for example (see comments at: https://www.regulations.gov/document?D=EPA-HQ-OA-2017-0190-38725, https://www.regulations.gov/document?D=EPA-HQ-OA-2017-0190-35023, and https://www.regulations.gov/document?D=EPA-HQ-OA-2017-0190-51088):
    - demolition of emission units to be retired or replaced (does not meet criteria 4 and 5 as outlined in definition of begin actual construction)
    - building excavation (unrelated to the emission unit pad itself), bringing in fill to prepare the area where the emission unit(s) will sit, construction/installation of foundations, buildings/footings (does not meet criteria 4 as outlined in definition of begin actual construction)
    - laying underground piping, digging drainage conduits (does not meet criteria 4 as outlined in definition of begin actual construction)
    - binding contract with a vendor to purchase equipment (does not meet criteria 1, 2, 3, and 4 as outlined in definition of begin actual construction)
    - site lighting, electrical installation for a new building or section of a building (does not meet criteria 4 as outlined in definition of begin actual construction)
    - laying foundation for the new equipment (does not meet criteria 4 as outlined in definition of begin actual construction)
    - tie-ins to existing process units (does not meet criteria 4 as outlined in definition of begin actual construction)

  While we understand EPA no longer intends to follow certain interpretations in previous memoranda, explicit statements on situations cited in those memoranda would provide greater clarity and detail, tying back to the five criteria outlined in the definition of "begin actual construction"; e.g.:
  - planning, ordering of equipment and material, site-clearing, grading, and on-site storage of equipment and materials (now allowed)
  - activities of a permanent nature - including but not limited to installation of building supports and foundations, paving, laying of underground pipe work, construction of any permanent storage structure, and activities of a similar nature (no longer prohibited)
  - permanent and/or preparatory construction activity that is "costly, significantly alters the site, and/or permanent in nature" (no longer prohibited)

2. **Clarity and transparency in case-by-case determinations can provide assurance for compliance and environmental protection.** As EPA explains in footnote 33 of the Draft Guidance, "While ease of administration and a desire to avoid case-specific determinations are themselves laudable goals, the Agency must also interpret and apply its rules in a manner that it consistent with the plain text of those rules." Understanding this, we encourage EPA to make clear the criteria that will be considered by EPA, and that EPA-delegated permitting authorities should consider, in making such determinations.

   We believe a case-by-case determination should not be required if a facility is following the five-point criteria in the definition for beginning actual construction and following the New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) requirements. A facility in many cases will be purchasing equipment prior to a permit application being considered by the permitting authority due to lead time for equipment design, construction, and procurement, which at times takes more than 12 months from date of a contract. An owner/operator should be able to accept all liability associated with the possible denial of the permit application, and this should be made explicitly clear – the owner/operator must recognize that the resources (*e.g.*, time, money) expended in undertaking such construction may be wasted should they be required to redo or revise work already completed in order to obtain a permit, or should it ultimately be the case that no permit is issued, or if the permit review agency determines that design changes (*e.g.*, stack height, emission unit location, etc.) are needed.

   To address any concerns with the integrity of the NSR permitting process, EPA and other permitting authorities could consider more explicitly reiterating and demonstrating that they have fulfilled their obligations (e.g., as in the Draft Guidance, "determin[ing] Best Available Control Technology for a new emissions unit at a facility based upon the permit application submitted, without regard to the preparatory activities an applicant may conduct on site").

3. **Further clarity or confirmation on "part" of a stationary source may be helpful.** EPA's Draft Guidance states that '[a] "part" of a stationary source that does not "emit" or "have the potential to emit" is not an emissions unit' and 'the most sensible reading is that an emissions unit is the "part" of a stationary source "that emits."' Our reading of this is that a distinction is being made between "which/that emits" and "would have the potential to emit." In following the previous discussion on the definition of begin actual construction, where the facility must meet all five of the criteria in the definition, and therefore if the part does not meet that criteria it is allowed to be constructed, examples allowed include:
   - installing footings for the emission unit
   - installing utilities for the process (i.e. electrical feeds, etc.)
   - installing ductwork for the process

   All the above are part of the process and do not meet criteria 4 of the definition of begin actual construction. Therefore, if the part does not emit or have the potential to emit, construction is allowed.

4. **State reviews of State Implementation Plan (SIP) interpretations would be helpful.** Many states have developed their own guidance and definitions for pre-permitting activities, which were approved pursuant to federal delegations or individual SIP-approved NSR regulations. We encourage EPA to add wording that encourages states to review their interpretations, since most are based on previous federal guidance.

***

In closing, we thank you again for addressing the interpretation of "begin actual construction," which is of critical importance to members of PLASTICS and the broader plastics industry, and the opportunity to comment on this Draft Guidance. Please contact Marie Gargas, Senior Technical Director, Regulatory Affairs at 202-974-5200 if you have any questions.

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May 11, 2020

SRNS-J2200-2020-00131
RSM Track # 10808

Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

To Whom It May Concern:

ATTENTION DRAFT GUIDANCE: INTERPRETATION OF "BEGIN ACTUAL CONSTRUCTION" UNDER THE NEW SOURCE REVIEW PRECONSTRUCTION PERMITTING REGULATIONS

The SRNS is pleased to submit comments on the Environmental Protection Agency's (EPA's) Draft Guidance: Interpretation of "Begin Actual Construction" under the New Source Review Preconstruction Permitting regulations.

SRNS agrees with the revised interpretation allowing facilities to undertake physical on-site activities provided that the activities do not constitute physical construction on an emissions unit. This interpretation will maintain air quality standards while allowing increased efficiency in initiating construction activities on portions of the project that are not the actual emissions unit. We concur this new interpretation is consistent with the regulatory text and that permit applicants understand permitting leverage is not obtained by performing onsite construction activities on the non-emission unit portions of a project/modification.

If there are any questions, please contact me at 803-952-7435.

Sincerely,

Adam R. Waller
Environmental Compliance

Enc.

c: J.G. DeMass, DOE-SR, 730-B
M.N. Ndingwan, 730-B,
C.L. Bergren, SRNS, 730-4B
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Eric J. Stuart
Vice President, Energy & Environment

Phone: (202) 296-1515

21st Century Steelmakers

May 11, 2020

BY EFILE

Anne. L. Idsal
United States Environmental Protection Agency
Office of Air and Radiation, Mail-Code 6101A
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

Re: Steel Manufacturers Association's Response to Request for Comments on Draft Guidance Titled, "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations"

To Principal Deputy Assistant Administrator Idsal:

The Steel Manufacturers Association ("SMA") is pleased to provide these comments in support of the U.S. Environmental Protection Agency's ("EPA's" or "the Agency's") interpretation of the phrase "begin actual construction" in the Agency's New Source Review ("NSR") permitting regulations ("Construction Interpretation").[1] We believe the Construction Interpretation is permissible under the Clean Air Act ("CAA" or "the Act"), consistent with EPA's NSR regulations, protective of human health and the environment, and a necessary improvement to EPA's air permitting process.

The SMA is the largest steel trade association in North America in terms of membership, and the primary trade association of electric arc furnace ("EAF") steel producers, often referred to as "minimills," that make various steel products, including carbon, alloy, and stainless steels, from a feedstock of nearly 100 percent steel scrap. The member companies of the SMA are geographically dispersed across the country and account for over seventy-five percent of total domestic steelmaking capacity.

As one of the most heavily regulated industries in the world, the EAF steelmaking industry is acutely familiar with permitting programs that are fraught with unnecessary delay and regulatory uncertainty, and which consume both time and resources without delivering meaningful environmental benefits.

[1] See https://www.epa.gov/nsr/forms/draft-guidance-interpretation-begin-actual-construction-under-new-source-review.

Permitting delays and regulatory uncertainty are not merely inconvenient aspects of environmental regulation, nor are they the inevitable result of protective regulatory regime. Permit-driven delay and uncertainty profoundly suppress investment in the domestic steel industry. Given international competition and the razor-thin margins in steel manufacturing, permit timing and uncertainty regarding a company's ability to strategically time the construction of capital improvements can often cause a company to opt against investing in new mills or expanding existing mills. This disincentive to investment squanders an opportunity to provide well-paid jobs and improve the steel industry's international competitiveness.

Suppressing investment in the steel industry also sacrifices an opportunity to improve the environmental sustainability of domestically-produced steel. Permit delay and unnecessary constraints on staging the construction of capital improvement projects also suppress deployment of equipment that use less energy, reduce water consumption, produce less waste, and which operate more efficiently and reliably. Steel is the most recycled material in the word, and steel produced in domestic EAFs is the cleanest, greenest, most sustainable steel in the world. Therefore, regulatory approaches that allow the domestic EAF steel industry to expand and improve their processes can be a tremendous benefit to the environment.

Of all the types of permitting processes to which EAF mills are subject, air permitting under Title V of the CAA is frequently the most complex and inefficient. As such, the SMA appreciates this Administration's efforts to improve the clarity, predictability, and efficiency of air permitting, particularly with respect to the NSR program.

EPA's March 25, 2020 Construction Interpretation reflects an important step in EPA's effort to improve the clarity and efficiency of NSR permitting and demonstrates that NSR reform need not be accomplished at the expense of environmental protection. In fact, given that the Construction Interpretation reflects a direct reading of the plain language of EPA's longstanding NSR regulations, it can hardly be viewed as an interpretation at all. Consistent with the CAA and EPA's regulations, the Construction Interpretation merely clarifies that the Agency's prohibition on constructing an emissions unit prior to issuance of an NSR permit applies only to the emissions unit, and not to other structures or installations necessary for the project. Under this interpretation, facilities are provided the flexibility to more safely and efficiently stage the construction of their capital improvement projects. And because this Construction Interpretation maintains EPA's prohibition on the construction of the emissions unit until the emissions unit is fully permitted, this interpretation does not in any way diminish the Agency's protection of air quality.

As further explained in the more detailed comments that follow, the SMA supports the Construction Interpretation because we believe it is consistent with the CAA and EPA's regulations, necessary to the safe and efficient construction of capital projects, and fully protective of the environment. As such, and because EPA's adoption of the Construction Interpretation was necessitated by previous Agency interpretations that imposed more restrictive bans on construction activity, the SMA urges EPA to utilize notice-and-comment rulemaking to adopt the Construction Interpretation as a regulatory clarification.

I. Construction Interpretation's Consistency with the CAA and EPA's NSR Regulations

The Construction Interpretation is a lawful exercise in agency discretion because it is in accordance with the CAA and consistent with EPA's existing regulations. The CAA Amendments of 1977 created the NSR program to be a preconstruction permitting program under which a source owner must obtain a permit prior to constructing a major stationary source or undertaking a "major modification" of an existing source. Under this program, project proponents and permitting authorities first analyze the proposed project's anticipated impacts on air quality to determine whether the project can be constructed and whether specific control technologies and/or emissions limits will be required.

Because Congress wanted to ensure that projects potentially impacting air quality could not proceed without the requisite analyses and controls, it directed that major emitting facilities could not "be constructed . . . unless . . . a permit has been issued."[2] Congress, however, did not provide guidance on the point at which a source can be considered "constructed" or when on-site construction activities could begin. Instead, EPA provided these clarifications in regulations promulgated in 1980 ("1980 NSR Rules").[3] The 1980 NSR Rules stated that no stationary source "shall *begin actual construction* without a permit . . ."[4] and then defined the phrase "begin actual construction" as "in general, initiation of physical on-site construction activities on an *emissions unit* which are of a permanent nature."[5] The regulations then went on to define "emissions unit" as "any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act."[6] As such, when read together, EPA's own regulations have since 1980 directed that the NSR program's prohibition on construction without a permit applied only to the unit that emits, or has the potential to emit, air pollution.

Despite this longstanding regulation narrowly limiting the NSR program's construction prohibition to only the emissions unit, the Agency has for decades applied the construction prohibition to "any installation necessary to accommodate the emissions unit," and not just the emissions unit itself. EPA imposed this overly broad application of the NSR program's construction prohibition informally through guidance, memoranda, and other Agency statements, and did so in a way that generated unnecessary confusion and created inconsistencies with state permitting authorities.

EPA's present Construction Interpretation addresses this confusion and inconsistency by abandoning decades of expansive informal interpretations and returning to the plain text of the regulations EPA promulgated in 1980. As those 1980 NSR Rules instructed, sources are only prohibited from beginning actual construction on the emission unit, as the term is defined in 40 CFR 52.21(b)(7). Under the present Construction Interpretation, sources can engage in on-site

[2] 42 U.S.C. 7502(c)(5).
[3] 45 Fed. Reg. 52,676 (Aug. 7, 1980).
[4] 40 CFR 52.21(i)(1) (1980) (emphasis added).
[5] 40 CFR 52.21(B)(11) (1980) (emphasis added).
[6] 40 CFR 52.21(B)(9) (1980).

physical construction and preparatory activities on non-emitting portions of the capital project, including installations necessary to accommodate the emissions unit. As such, EPA's "new" Construction Interpretation is not really new. It is the same interpretation that the Agency crafted through notice-and-comment rulemaking forty years ago. By simply following, rather than evading, the Agency's own 1980 NSR Rules, EPA's Construction Interpretation represents a lawful interpretation – in fact, the only lawful interpretation – of the scope of the NSR program's prohibition on construction and modification activities prior to the issuance of a permit.

II. The Construction Interpretation is Necessary

In addition to creating confusion and inconsistency with state programs, EPA's prior interpretations affect a wide range of otherwise lawful preparatory activities that facilities might otherwise desire to undertake for purposes of expediting projects or taking advantage of more opportune times for construction. EPA's impermissibly restrictive interpretations prohibited companies from scheduling construction and other preparatory activities during scheduled outages, in conjunction with other repairs, or during most favorable weather conditions. Scheduling construction activities during outages and most favorable weather is not only the most expedient approach, but it is also often the safest. And if those construction and preparatory activities do not involve emissions units, their prohibition is wholly unjustified and potentially dangerous—particularly given the length of time it takes to get a permit and the broad universe of activities EPA's prior interpretations prohibited during the lengthy permit process.

Preconstruction permits can take 18 month or more to obtain, and without the Construction Interpretation's return to the plain text of the 1980 NSR Rules, sources could face lengthy prohibitions on safely and efficiently scheduling very basic preparatory activities, such as excavating and pouring foundations, installing lighting, grading for site drainage, preparing tie-ins, demolishing old emissions units, and a wide variety of other activities only peripherally related to the construction of the emissions units undergoing permitting.

None of these activities constitutes construction of an emissions unit, and no company should face the risk of enforcement based on EPA's prior interpretations broadly expanding the NSR program's ban on pre-permit constriction. EPA's 1980 NSR Rules are clear and, with the aid of the Agency's Construction Interpretation, are unambiguous – regulated entities should be allowed to carry out any construction that is associated with a pending permit request so long as it is not construction actually "on the proposed emissions unit" for which a permit is sought.

III. The Construction Interpretation Protects Air Quality

EPA justified its prior interpretation based on concerns that a company might undertake preparatory construction activities so that the company could then use the partially completed project to pressure permitting authorities or persuade reviewing courts that a permitting authority's refusal to issue an air permit would unfairly deprive the company of its investment. Regardless of whether this was ever a credible concern, it is certainly not a valid concern today.

Permitting authorities rigorously scrutinize preconstruction permits. These permits are subject to public processes, frequently reviewed at the state and federal level, and often litigated. After 40 years of regulation and permitting, the regulators and the regulated community alike are acutely aware that the NSR permitting process will not be so easily undermined by a company's decision to invest in preparatory construction. There is no evidence that EPA or state agencies were ever influenced by this "equity in the ground" and volumes of evidence showing that permitting authorities will in fact render permit decisions that can deprive companies of their pre-permit investments. After 40 years of litigation, courts have become similarly immune to shallow arguments that a company's view of the equities trumps the CAA.

Even if the prior interpretation were based on some evidence that permitting authorities could be easily swayed (which it is not), it would still be considered an improper interpretation. The prior interpretation attempted to address the Agency's own misplaced concerns about the objectivity of permitting authorities, not through EPA's exercise of greater oversight of those authorities, but by subjecting companies to a more expansive and burdensome construction ban. As companies operating in states where permitting authorities allow pre-permit construction activities have long understood, and as EPA now recognizes, a company that devotes resources to construction or preparatory activities prior to reviewing a preconstruction permit does so at its own risk. And those familiar with the preconstruction permitting process understand that the risk can be significant—issuance of a permit is never certain and rarely in accord with the timing and terms sought by the company.

No company reasonably expects that its pre-permit investments will sway a permitting authority or court. In fact, there are copious examples demonstrating that such an expectation is plainly unreasonable. There is simply no support for EPA's prior supposition that allowing pre-permit construction activities will lead to increased air emissions.

The only risks addressed through EPA's prior interpretations were economic, and the only parties that would have borne those risks would have been companies. Indeed, as restrictive and costly as the Agency's prior interpretations may have been, there is no evidence that they resulted in any environmental benefits at all. As such, the present Construction Interpretation, which rescinds those prior interpretations, does not have any adverse environmental impacts. It allows companies to make business decisions that may be risky or rational, but it does not help them obtain preconstruction permits or secure favorable terms in those permits.

IV. Promulgate the Construction Interpretation as a Rule

While, as noted above, the SMA believes that EPA's 1980 NSR regulations already allow companies to undertake pre-permit construction and other preparatory activities on project components other than the emissions unit, we also recognize that prior administrations have viewed this regulatory language as ambiguous enough to allow the Agency to adopt those interpretations that increased the scope of pre-permit construction bans. As such, the SMA believes that EPA should adopt the Construction Interpretation as a rule through formal notice-and-comment rulemaking under the Administrative Procedure Act.

EPA itself recognizes that the Agency's evolving interpretations of the phrase "begin actual construction" over the years have created significant confusion and uncertainty. While, as discussed above, the SMA believes the Construction Interpretation supplies a rational and legally sound interpretation of the phrase "begin actual construction," we are concerned that the Construction Interpretation may be viewed as merely the latest of EPA's evolving interpretations, and therefore as an interpretation that will continue to change or evolve.

The Construction Interpretation is an important interpretation, and it is equally important that the Agency firmly establish it as a rule. Given that states with permitting authority delegated under the CAA often look to EPA for guidance on this issue, it is particularly important that EPA demonstrate that the Construction Interpretation has the force of regulation and will endure. As such, the SMA respectfully requests that EPA promulgate the Construction Interpretation as a rule.

V. Conclusion

The SMA appreciates the opportunity to provide comments on the Construction Interpretation. As noted throughout these comments, we believe the Construction Interpretation is legally sound, environmentally protective, and necessary for a fair and efficient permitting process. The SMA appreciates and supports EPA's development of the Construction Interpretation and urges the Agency to promulgate the interpretation through notice-and-comment rulemaking. If you have any questions, please feel free to contact me at (202) 296-1515.

Sincerely,

/S/
Eric J. Stuart
Vice President, Environment, Energy, and Infrastructure Policy
Steel Manufacturers Association

South Coast
Air Quality Management District
21865 Copley Drive, Diamond Bar, CA 91765-4182
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Office of the Executive Officer
Wayne Nastri
909.396.2100, fax 909.396.3340
May 8, 2020

Submitted electronically to: ***draft_permitting_guidance@epa.gov***
Andrew K. Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Dear Administrator Wheeler:

The South Coast Air Quality Management District (South Coast AQMD) is pleased to offer its staff's comments on the draft guidance entitled *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*. EPA's website for New Source Review (NSR) permitting indicates this draft document was posted on March 25, 2020, and that EPA will accept public comment until May 11, 2020. The South Coast AQMD is the regional agency charged with primary responsibility for the control of air pollution to achieve and maintain the National Ambient Air Quality Standards (NAAQS) within the South Coast Air Basin. More than 25,000 businesses operate under various types of permits issued by the District. South Coast AQMD also has a federal delegation of authority to issue and modify Prevention of Significant Deterioration (PSD) permits.

Detailed comments on the draft guidance are enclosed. If there are any questions concerning the District's comments, please contact Mr. Brian Tomasovic, Senior Deputy District Counsel, at (909)396-3425 or btomasovic@aqmd.gov.

Sincerely,

Wayne Nastri
Executive Officer

Enclosure
WN/BT/vmr

COMMENTS BY THE SOUTH COAST AQMD REGARDING DRAFT GUIDANCE: INTERPRETATION OF "BEGIN ACTUAL CONSTRUCTION" UNDER THE NEW SOURCE REVIEW PRECONSTRUCTION PERMITTING REGULATIONS

I. Summary

On March 25, 2020, the United States Environmental Protection Agency (EPA) website that provides "news and announcements" for New Source Review (NSR) permitting posted a Draft Guidance document entitled *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*. The draft guidance proposes to adopt a revised interpretation of the phrase "begin actual construction," as defined at 40 CFR § 52.21(a)(2)(ii) and also found at 40 CFR §§ 51.166(b)(11), 51.165(a)(1)(xv), and Part 51, Appendix S II.17. The guidance asserts that this regulatory text should now be interpreted to broadly allow for on-site construction activities without an NSR permit for a major source or modification, so long as the construction activities are not "on" an "emissions unit," as specified by the guidance. By the terms of the draft guidance, a permit to construct is needed only for activities of construction on the "part of a stationary source" that emits any regulated NSR pollutant. The draft guidance asserts that even an installation that is necessary to accommodate an emission unit can be done without a major NSR permit. Draft Guidance at 2-3. The South Coast AQMD provides the following comments on the draft.

II. Comments

We generally oppose the draft guidance and demand compliance with EO 13891.

We generally oppose the draft guidance, and we provide our specific objections in comments that follow. We also support and hereby incorporate by reference the comments by the National Association of Clean Air Agencies (NACAA) that are to be submitted on May 11, 2020. Due to serious concerns with the draft guidance, we urge its retraction. If EPA should press forward, however, it must acknowledge that various objections to this draft guidance raise "major concerns" within the meaning of Executive Order 13891, *Promoting the Rule of Law Through Improved Guidance Documents*, 84 Fed. Reg. 55235 (November 15, 2019).

EPA's commitment to compliance with EO 13891 should draw scrutiny.[1] Now that implementing instructions for the Executive Order are in effect, interested persons may validly demand a "public response from the agency to major concerns raised in comments." While the terms of the EO disclaim, as is usual, the creation of any "right…substantive or procedural, enforceable at law or in equity" against EPA, we believe that any manifest violations of EO 13891 when issuing new guidance should, by the same token, give valid grounds for a petition to withdraw the offending guidance document under the EO. In practical effect, OMB's

[1]For one reason, the recently-signed *Revised Policy on Exclusions from "Ambient Air"* (December 3, 2020) plainly failed to address major concerns raised by South Coast AQMD comments, including an unmistakable objection that "ambient air" must satisfy secondary NAAQS protections.

implementing guidance signifies that new regulatory guides should not be authoritative unless they comply with EO 13891. Thus, any procedural or substantive infirmities in complying with the EO in issuing this draft guidance should mean the guidance is to be rejected. *Cf. Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers,* AFL-CIO, 676 F.3d 566, 576-578 (7th Cir. 2012) (declining deference when the agency had itself "disclaimed the use of regulatory guides as authoritative").

Last, the agency should contemplate whether any weight that could be given to any finalized guidance will be cast in serious doubt by the agency's decision to seek public comment now, when many stakeholders face operational challenges and other limitations during the height of the COVID-19 pandemic. We believe fair credence is owed to interested parties who would now or later assert an inability to meaningfully participate due to the circumstances of a questionable, inappropriate deadline.

The 1980 NSR rules adopted "Begin Actual Construction" for no other reason than to codify the policy of the December 1978 Reich Memorandum. The regulation is not genuinely ambiguous and therefore not open to the proffered interpretive change.

As the draft guidance notes, in December 1978, EPA's Director of its Division of Stationary Source Enforcement issued a memorandum on the interpretation of "construction" for deciding what activities may be conducted prior to receiving a permit to construct under Prevention of Significant Deterioration (PSD) program requirements. In the earliest months of enforcement, that office had insisted that the appropriateness of site-clearing without a permit should be examined case-by-case, which may include consideration for whether a site is susceptible to environmental impact.[2] Breaking from and relaxing that approach, however, the December 1978 memorandum had determined that certain limited activities were allowed in all cases, specifically: "planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials." In terms of prohibited activities, the new policy stated, "all on-site **activities of a permanent nature** aimed at completing a PSD source…are prohibited under all circumstances," and those prohibited activities "**include installation of building supports and foundations**, paving, **laying** of **underground pipe work**, **construction of permanent storage structures**, and activities of a similar nature."

It is no coincidence that the 1980 NSR definition of "begin actual construction" was promulgated to specify that the regulatory definition means:

> …in general, initiation of physical on-site construction **activities** on an emissions unit which are **of a permanent nature**. Such activities **include**, but are not limited to,

[2] As the memo states: "For example, we said that site clearing might be inappropriate for a source proposed to be constructed in a heavily forested Class I area, but permissible for a source proposed to be constructed on a junk-strewn lot in a heavily industrialized Class III area."

> **installation of building supports and foundations**, **laying underground pipework**, and **construction of permanent storage structures**.

The verbatim copying of language and even the order of phrasing from the 1978 memorandum is unmistakable. EPA's intent was to codify what was in fact the agency's newly *permissive* stance that certain preparatory site-clearing activities would not be prohibited as activities of "actual construction," though broader construction activities were to remain categorically prohibited.[3]

The Administrator Browner-signed preamble discussion of July 23, 1996 affirmed that "the regulations and EPA's longstanding policy *clearly* identify the scope of prohibited construction activities." 61 Fed. Reg. 38250, 38270-38271 (emphasis added). The operative question then was whether there was need "for potential *changes to the current regulations* that would allow greater flexibility with respect to construction activities in the case of a proposed *modification* of a source" *Id*. at 38271. (emphasis added). In other words, even acknowledging as EPA then did that the statute does not address the details of the construction process, EPA and stakeholders considered it necessary to undertake notice and comment rulemaking to make changes, if any, to the NSR regulations. *See id.* at 32870 ("…industry members…recommended that EPA change the NSR regulations…").

Considering this background, it does not appear to be credible or well-defensible for EPA to now assert the regulation's "plain language" allows, without notice-and-comment rulemaking action, for implementation of a dramatic legal change to the long-standing meaning that has been applied and broadly followed for decades. The evasion of notice-and-comment requirements is magnified in this case by the good possibility that EPA should conclude the action has federalism implications and should therefore warrant intergovernmental consultation prior to any publication of a notice of proposed rulemaking.

The draft guidance provides an interpretation that will conflict with implementation of the statutory BACT requirement.

The draft guidance correctly acknowledges that the Clean Air Act requires permitting authorities to assign limits "based on a determination of the 'best available control technology' (under the PSD program) or the 'lowest achievable emission rate' (under the nonattainment NSR

[3] This is exactly what is stated in the 1981 letter cited in footnote 18 of the Draft Guidance; the letter states the regulatory definition for begin actual construction "is based upon Mr. Reich's December 18, 1978 memorandum, and was intended to embody in regulatory form the Agency's policy that site preparation activities do not trigger Federal PSD requirements." Curiously, the draft guidance omits citation to this letter being published in the *Federal Register* as a final action determination of applicability for the source. *See* City of Detroit; Central Industrial Park Project—Detroit, Michigan; Applicability of New Source Review Regulations, 46 Fed. Reg. 37,778-01 (July 22, 1981).

program).” Draft Guidance at 3. At the same time, the draft guidance makes the novel and unprecedented statement that construction activities that involve “accommodating installations” for an emission unit “may be undertaken in advance of the source owner or operator obtaining a major NSR permit.” Draft Guidance at 12. Here especially, the draft guidance is highly problematic in its failure to consider its potential for distortionary effects on the BACT review process.

The draft guidance states, “a source cannot use the equity and resources expended to claim cost infeasibility or otherwise influence the Best Available Control Technology (BACT) determination or the decision to the grant the permit,” but this phrasing—focused on *equity, resources expended*, and *cost infeasibility*--suggests the agency means to disingenuously evade, rather than confront, the issues. *Id*. Footnote 32 of the draft guidance compounds this deficiency by again only cautioning that the BACT analysis should disregard “the *cost* of any adjustments or modifications to already constructed portions of the facility necessary to install any particular control when determining the *cost* of that technology.” Strikingly, for a draft guidance that also disclaims any effort at “providing detailed guidance on how the specific parameters of an emission unit are to be ascertained,” this would appear to be the *only* part of the draft guidance to discuss or even envision the potential for application of control technology to an emission unit.

Of course, the need to consider the application of add-on controls or inherently lower-emitting processes/practices/designs is the *sine qua non* of NSR. Permit writers accustomed to EPA’s top-down framework for conducting BACT analyses understand that consideration of costs is not immediately pertinent. The greater issue is whether pre-application construction activities and design commitments may hinder the application of controls even before control costs could be examined. EPA cannot evade its responsibility. EPA must squarely address how the permit reviewer for BACT Step 1 (*Identify all available control options*) and BACT Step 2 (*Eliminate technically infeasible options*) must handle the permit applicant who would state that already constructed portions of the facility serve to render a candidate control option “not available” for purposes of Step 1 and/or to eliminate it as technically infeasible for purposes of Step 2.

It does not suffice for the draft guidance to sidestep this issue by stating a “PSD permitting authority must still continue to determine BACT based upon the permit application submitted.” *See* Draft Guidance at 19. As EPA is surely aware, 40 CFR § 52.21(r)(1) sets the source’s obligation to construct or operate “in accordance with the application submitted pursuant” to NSR regulations. Hence, the terms of federally-issued PSD permits will often state, on their face, that construction is authorized only “in accordance with the permit application (and plans submitted with the permit application).” The draft guidance presents an interpretation whereby the source may initiate construction of a source or facility—in potential contravention of the statute’s language—before even applying for a permit to construct one or more emission units. So-called “equity in the ground” must be understood, therefore, in the terms of the permit

applicant who may deny, wrongly, that already constructed portions of a major facility are not in the scope of NSR or BACT review.[4]

The draft guidance provides an interpretation that conflicts with the Clean Air Act's requirement to recognize and regulate fugitive emissions in major NSR.

By the terms of the Clean Air Act, preconstruction review requirements extend to certain major emitting facilities and sources of fugitive emissions. *See* Clean Air Act section 302(j). Regardless of whether fugitive emissions are included in the determination of applicability, once a project is subject to major NSR permitting, any fugitive emissions must be addressed by application of BACT or LAER requirements. Thus, it is striking that the draft guidance does not once mention fugitive emissions. As defined at 40 CFR § 52.21(b)(21), fugitive emissions are "those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." Hence, when the draft guidance fixates on the definition that an emission unit is the "part of a stationary source" that emits any regulated NSR pollutant, EPA must be reconciled to the point that vast, perhaps nearly all, portions of a major emitting facility or stationary source that emits fugitives will be subject to the statutory prohibition on construction without a permit, even under the interpretation pressed by the draft guidance. Consistent with Clean Air Act section 302(j), EPA has listed 28 source categories for which fugitive emissions must be included in determining whether a source is a major stationary source. 40 CFR § 52.21(b)(1)(iii). As EPA must acknowledge, the listed source categories include various types of plants, mills, and smelters that are recognized to have fugitive emissions. As EPA must further acknowledge, permitting of fugitive emissions may but does not necessarily recognize fugitive emissions to emit from some particular emissions unit. In some cases, an entire building within a facility may be designated as an "emission unit," but this naming convention is not necessarily or invariably followed. In some cases, any area of traffic for the movement or storage of materials—even a walkway between buildings—may be acknowledged as a source of fugitive emissions that may need to be addressed with appropriate PSD permit terms and conditions. The draft guidance fails to consider how all manner of structures and underground pipework may be recognized to have fugitive emissions and should constitute parts of a stationary source that emit regulated NSR pollutants. It is unacceptable, therefore, for the draft guidance to ignore fugitive emissions. For at least 28 source categories, and indeed for any major source with significant fugitive emissions, EPA must concede that its blinkered reading of "begin actual construction" cannot be squared with the Act's prohibition on construction of a major source or modification without a permit. Whether considering fugitive emissions in terms of wind-blown dust or lead, or in terms of leaking GHGs, the entirety of the facility design and operations must be in the scope of NSR review for a new major source.

[4] This is far from a speculative objection since recent challenges of PSD permit decisions to the Environmental Appeals Board have centered on whether the BACT review validly eliminated add-on controls (e.g., carbon capture and sequestration or solar auxiliary power) at Step 1 and Step 2 of the BACT analysis, even before the consideration of cost effectiveness.

The draft guidance provides an interpretation that conflicts with federal provisions for permit expiration.

Under existing regulations, the onset of construction activities by a PSD permit holder effectively works to vest the permit holder's right to complete its construction of the PSD source and avoid the permit's expiration. The draft guidance nowhere addresses this issue, and it ignores the potential for permitting authorities and permit holders that rely on it to face newfound problems of permit expiration. Consider the example of a major NSR permitting action for a power plant that would be a simple-cycle natural gas combustion turbine. Constructing the entirety of the new facility would require a new building to house the turbine, new gas transmission connections, and systems for electrical transmission—parts of the source that would conventionally count as accommodating installations that should require a PSD permit before construction could commence. The draft guidance would instead seem to posit that the source would only "commence construction" of the kind that requires a permit (i.e., "begin actual construction") at the time it installs the turbine. As EPA should recognize, however, this kind of combustion equipment may be large, but it is manufactured off-site and its delivery may come many months after regularly understood construction has begun. Implementing the interpretation advanced by the draft guidance may risk permit expiration at the 18th month, and indeed it may be inconsistent with the construction schedule for many other types of sources. *See* 40 CFR § 52.21(r)(2). It does not suffice for EPA to claim that the meaning of "begin actual construction" should not be relevant to permit expiration, because any such claim would ignore prevailing case law. *See Sierra Club v. Franklin County Power of Illinois*, LLC, 546 F.3d 918, 930 (7th Cir. 2008).

The draft guidance provides an interpretation that conflicts with historical implementation and judicial precedent on Clean Air Act "stop construction" authority.

As provided by section 167 of the Clean Air Act, "The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction of major emitting facility which does not conform to the requirements" of Part C of the Act. EPA cannot dispute that this draft guidance raises federalism implications, because this statutory section (that straightly relates to the PSD permit requirement) confers power on EPA *as well as* the States to initiate PSD enforcement proceedings. According to longstanding EPA guidance, Section 167 provides "a particularly effective enforcement tool against an owner or operator that has commenced construction without having obtained a PSD permit…."[5] In that situation where the source fails to have the required permit, EPA has stated that it should "take action to halt construction of the source immediately," including by

[5] *Guidance on Enforcement of Prevention of Significant Deterioration Requirements under the Clean Air Act* (December 14, 1983) at 4, https://www.epa.gov/sites/production/files/documents/prev-deter-rpt.pdf

"obtaining judicially imposed injunctive relief."[6] The draft guidance ignores the statutory responsibility to prevent construction of a major emitting facility that lacks a permit by using an unduly narrow focus on the words "emissions unit." Plainly, the statute requires action to prevent construction of the entire emitting facility, and the statutory charge cannot be constrained by a narrow reading of regulatory language. Moreover, EPA's new interpretation fails to recognize a core purpose of this statutory requirement--to *prevent* a source from unilaterally acquiring "equity in the ground" by investing in substantial construction before receiving a permit. Of course, for a draft guidance that purports to fairly address "equity in the ground," it is wholly inadequate for EPA to give no consideration or discussion to the abnegation and diminishment of this formidable enforcement tool. Consideration of equity may or may not factor in the determination of BACT and in the judgment of whether to issue a permit, but it is assuredly in sharp relief in cases where the agency must seek injunctive orders to prevent and deter violations of PSD requirements. Notably, EPA's longstanding guidance on agency enforcement of PSD requirements explains that construction without a permit is defined to begin with the onset of "activity beyond that permitted under the policy enunciated in the December 18, 1978 memorandum from Ed Reich" (which was attached as an appendix to the enforcement guidance).[7] The current draft guidance is arbitrary and unreasoned in its failure to consider its pronounced inconsistency with EPA's longstanding, court-affirmed positions on its available PSD enforcement measures. These measures include the authority of EPA and States to issue stop-construction orders and obtain injunctions to prevent construction--a Clean Air Act enforcement power that is not theoretical and was validated by the United States Supreme Court. *See Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004).

The draft guidance provides an interpretation that conflicts with source's requirement to provide an additional impact analysis under 40 CFR 52.21(o) and the statutory right of opportunity for a hearing on that analysis.

The additional impacts analysis required by 40 CFR § 52.21(o) includes the required element that the owner or operator shall provide an analysis of "growth associated with the source or modification." While there is no cookbook approach for conducting the required growth analysis, the source is expected to in some fashion address the emissions attributable to associated growth as *secondary emissions*. EPA's NSR Workshop Manual (Draft 1990), for example, provides the example of a growth analysis that may be appropriate for the permit application of a mine mouth power plant. The Workshop Manual's example analysis examines the impacts of the construction work force commuting to the site, as distinct from the impacts of relocating permanent jobs associated with the project. As illustrated, the details and impacts of construction may be discussed in the application or statement of basis for a draft PSD permit to ensure the section 52.21(o) requirement is satisfied.

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[6] *Id.*
[7] *Id.* at 6.

Clean Air Act section 165(a)(3) provides interested persons the right of an opportunity to comment at a public hearing "on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." EPA cannot ignore that the draft guidance provides an interpretation that will necessarily conflict with the right of interested persons to comment on the quality of the additional impacts analysis that supports a draft permit. The draft guidance posits instead that significant construction and installation activities from the project—indeed, all construction for "accommodating installations"— would not, in fact, be subjects of the additional impacts analysis or be open to comment.

Moreover, EPA must acknowledge that the conduct of construction of a major source or major modification may itself be subject to local regulation or permitting for the emissions attributable to the construction activities or its equipment.[8] For a local permitting authority, those emissions may even be addressed as requirements within one or more associated minor NSR permitting actions or in permitting the applicable requirements of a Title V permit. The local air pollution control authority may be able impose requirements to mitigate the impacts of secondary emissions identified in an additional impact analysis. We are not aware of any precedent for EPA to suggest secondary emissions may be outside the scope of permissible comment on a draft PSD permit, but we see the draft guidance to illogically empower the permit applicant to dispute need for such analysis when those impacts are not from construction "on" an emissions unit. Across innumerable permitting actions, EPA has recognized that a public hearing on a PSD permit may well coincide with a hearing on other requirements of the Clean Air Act, including federally-approved minor NSR permitting or Title V permitting actions. The interpretation offered by the draft guidance is not reasoned and cannot be defensible when it ignores these issues.

The draft guidance fails to adequately consider compliance with cross-cutting statutes and directives for issuing federal permits. For delegated PSD programs, this causes unacceptable uncertainty and may also conflict with ancillary requirements of state law.

South Coast AQMD has an agreement for partial delegation of authority to issue and modify prevention of PSD permits. The agreement requires withholding issuance of "a final PSD permit unless [the Fish and Wildlife Service] has determined that the proposed project will not affect any endangered species."[9] Similarly, a host of federal PSD permitting actions acknowledge EPA's need to comply with other requirements of federal law, often referred to as "cross-cutting" laws that may pertain to the permitting action. It is not unusual, for example, for a draft statement of basis for a PSD permit to mention requirements of the Endangered Species Act, the National Historic Preservation Act (NHPA), and Executive Order 12898 on Environmental

[8] For example, EPA has federally-approved District Rule 403 on fugitive dust, which imposes requirements for a variety of construction activities sources.
[9] https://www.epa.gov/sites/production/files/2015-08/documents/south_coast_aqmd_psd_delegation_agreement.pdf

Justice.[10] Given this background, the draft guidance is deficient in its statement that a PSD permit applicant must be "mindful that some on-site activities prior to obtaining a PSD permit could be limited by other laws that may apply in certain circumstances, such as the Endangered Species Act and National Historic Preservation Act, when there are listed species or historic resources at the site." It is not the owner/operator that must be mindful of these other laws, but rather the EPA that must be responsible for federal compliance with Section 7(a)(2) of the Endangered Species Act and Section 106 of the NHPA. EPA's failure to straightly address future management of these requirements under the interpretation is unreasoned and will brew chaos in the permitting process and make major NSR permit projects vulnerable to challenges and litigation.

EPA also cannot ignore that more than a dozen states, including California, have adopted state environmental policy acts on the model of National Environmental Policy Act (NEPA), and these laws may require state agencies to prepare environmental impact statements to address potential environmental consequences of a proposed permitting action. Proposed actions that necessitate such compliance may include PSD permitting under a delegation or the permitting of other criteria pollutants for the same project outside of PSD (minor NSR or nonattainment NSR). The proposed interpretation offered by the draft guidance creates a high possibility of conflict in those permitting actions with environmental review requirements. When Congress gave EPA its statutory responsibilities for NSR permitting, it doubtlessly expected that EPA would disallow, by enforcement as needed, the conduct of partial construction during preconstruction review. EPA's exemption from NEPA for actions under the Clean Air Act[11] has been justified on the premise that EPA was already entrusted to be cautious and comprehensive in its review of environmental impacts in fulfilling its responsibilities under the Act. The interpretation offered by the draft guidance, however, gives license to partial construction without any consideration for activities that will have environmental impacts in the form of irretrievable and irrevocable commitments of resources.[12] Although "begin actual construction" overtly allows for site-clearing, it strains credibility for EPA, in the face of this backdrop, to now claim the regulation allows for significant activities of partial construction in advance of permit issuance.

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[10] See, e.g., https://archive.epa.gov/region6/6pd/air/pd-r/ghg/web/pdf/pinecrest-draft-sob061814.pdf

[11] Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)) exempts all EPA actions under the Clean Air Act from the requirements of NEPA.

[12] If EPA were to undertake notice and comment rulemaking, as required, for the revision of "begin actual construction," it would likely benefit from the input of the Fish and Wildlife Service, National Marine Fisheries Service, and State Historic Preservation Offices on whether the proposal presents a reordering of obligations under the statutes they administer. With respect to past PSD permitting actions, EPA has entered a variety of memorandums of agreement and programmatic agreements with these implementing agencies; the draft guidance only adds uncertainty to these established working practices and creates the potential for counterproductive conflict, or worse, violations of law, in the conduct of federal permitting.

The proffered interpretation of "permanent storage structure" is unreasoned and appears to be based in an anachronism.

The draft guidance asserts that the inclusion of the term "permanent storage structure" was meant to expansively allow for storage structures to be constructed to completion except for the case when the permanent storage structure is an "emission unit." The guidance then suggests the regulatory drafters must have had in mind such an example as "a petroleum or volatile organic liquid tank or vessel." Draft Guidance at 13. The explanation and argument are nonsensical for the reasons pointed out in the NACAA comment letter.

We would further note that argument is made worse in view of the historical setting and the problem of an introduced anachronism. The phrase, "volatile organic liquid," at least for regular EPA uses, traces to its New Source Performance Standard (NSPS), Subpart Kb, for *Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984*. This regulation was adopted in 1987, many years after the adoption of the "begin actual construction." 52 FR 11429 (Apr. 8, 1987).[13] Moreover, when the 1978 Reich Memorandum had used the phrase "permanent storage structure," the agency had only by then established Subpart K, as the first standard of performance (NSPS) for storage vessels for petroleum liquids (with capacity greater than 40,000 gallons). The established regulatory term, then as now, for petroleum liquid storage was "storage vessel," and the standard for control of those storage vessels in the late 1970s was exceedingly straightforward and simple. *See* 40 CFR § 60.113. While local and state regulation of petroleum storage vessels did exist and was important for the time, the control of these "structures"—as the draft guidance would try to refashion the reference—were nothing close to a centerpiece of BACT review that could have been in mind for EPA.[14] Consider that for a facility to even qualify for major NSR's listed source category of *petroleum storage transfer units with a total storage capacity over 300,000 barrels*, it would necessitate the storage capacity equivalent to more than 300 storage vessels of 40,000 gallons. This helps demonstrate how assigning BACT controls to volatile organic compounds from "storage structures" did not figure prominently in the programmatic understanding of sources that would be subject to PSD review the time. Volatile organic emissions were instead targeted in regulations for nonattainment areas. It is telling that the draft guidance's sole example of an impermissible storage structure—perhaps the only example EPA can conjure—would not have been understood and envisioned as one when the phrase "permanent storage structure" was promulgated. Instead, it would have been considered a "storage vessel." Accordingly, the one reasonable reading of the regulation is that it categorically prohibits the construction of permanent storage structures in advance of PSD permit issuance, even if these storage structures do not themselves constitute emissions units.

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[14] Moreover, petroleum liquid storage vessels did not have assigned numerical emission limitations--the conventional basis for the application of the BACT requirement.

EPA cannot evade judicial review of any finalized version of this draft guidance because it will have legal effects.

Although the draft guidance recites how it should count as an "interpretive rule" that does not create or alter any binding requirements, EPA must explain how any finalized version of the guidance should not be subject to judicial review. We believe the guidance will definitively alter the legal regime in several clear ways.

In addition to legal consequences described in our other comments, EPA must acknowledge that federal PSD permits invariably contain a permit condition that requires reporting on the initiation of construction. Finalization of the draft guidance will impact the meaning and implementation of the permit condition, including for any PSD permits that are issued and pending the initiation on construction.

No less importantly, EPA cannot dispute how its interpretation will have legal consequences for any source that faces liability exposure for failing to obtain a PSD permit. By some case law, the date on which a source acts to begin actual construction will, without tolling, begin the running of the statute of limitations for the violation. The draft guidance may add uncertainty to when such violations would begin to accrue, but EPA must concede the effect of the draft guidance is to place the first date of violation at some later time than has long been understood and implemented. The outcome of *Sierra Club v. Oklahoma Gas and Elec*., 816 F.3d 666, 673 (10th Cir. 2016), to take one example, could well have turned out differently for the defendant if the draft guidance were applied to those case facts. Moreover, even as the application of the draft guidance's interpretation may work to delay onset of the running of the statute of limitations (and thereby prolong its expiration) for the federal law violation of construction without a permit, the violator may benefit from diminishment in its exposure to statutory penalties, on the notion that penalties for prohibited construction activities may be assessed for each day of violation. *See id.* (*citing* 42 U.S.C. § 7413(e)(2), "[a] penalty may be assessed for each day of violation."). Since the guidance will alter the legal landscape, it amounts to judicially reviewable final agency action rather than mere non-binding and unreviewable guidance.

Contrary to claims in the draft guidance, no stakeholders appear to have asked EPA to wield its purported interpretive authority to reconsider "begin actual construction."

The draft guidance claims that EPA is prompted to reconsider an interpretation of "begin actual construction" because of requests by stakeholders. Footnote 4 of the draft guidance goes on to state that "stakeholder comments are discussed in more detail below." Despite this footnote's assertion, remarkably and inexplicably, no stakeholder input is discussed in the remainder of the draft.

Given the curiosity of this citation of support that went undiscussed, we reviewed the draft's referenced dockets for all comments on "actual construction."[15] While some stakeholders requested revision of the regulations, none assumed their request could be implemented by simply reversing how the regulation has been understood and implemented for decades. This further counsels against EPA's novel assertion of interpretive authority, and it further suggests the possibility that the proposal is based on a pretextual rationale. Even if EPA may now (as is to be expected) receive certain supportive comments on this deregulatory draft guidance, no federal agency is entitled to misrepresent the record or its basis of support for a proposal. To merely violate agency transparency commitments is one matter,[16] but we believe conduct that might rightly count as "astroturfing" for an agency outcome should never survive arbitrary and capricious review. As the Supreme Court has recently noted, the reasoned explanation requirement of administrative law "is meant to ensure that agencies offer genuine justifications for important decisions." *See Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2575-2576 (2019). Review of the cited dockets would suggest the disclosed grounds for taking the proposed action, in this form, are contrived or pretextual.

We also see no indication that EPA has even looked to the issue of whether significant comments on "begin actual construction" were submitted to the docket of the agency's 1996 proposal. At that time, unlike now, the agency had extended the courtesy of a 90-day comment period with the publication of a notice in the *Federal Register*, so it is reasonable to expect there were such comments. If EPA has ignored pertinent comments that were submitted to "Air Docket A-90-37," we might suspect those comments were disregarded as being non-supportive of this newly pressed interpretation. And if comments were instead ignored out of neglect or work avoidance, those failings could not be squared with the draft's statement that the agency "does not take lightly the decision" to revise the meaning of the regulation. Draft Guidance at 3.

The Principal Deputy Assistant Administrator is not an authorized proponent of guidance for the Office of Air and Radiation.

We recognize that Clean Air Act section 301(a) authorizes the Administrator to delegate his powers and duties under the Clean Air Act "as he may deem necessary or expedient," although it must be noted this authority is not delegable for regulatory revision of "begin actual

[15] The search results thus yielded any variations on the words before the phrase "actual construction," e.g., begins, beginning, begin, etc.

[16] In fact, South Coast AQMD has previously submitted comments objecting to vague, unidentified, untraceable references to stakeholder support or input for recent proposals. In those previous cases, we did not suspect the representations were disingenuous, only that that EPA failed to add identify or add the communications with specificity to the record. We note that we received no response to a past recommendation that EPA establish a "Nonrulemaking" docket for supporting documents and comments on draft guidance at regulations.gov, and we renew that recommendation.

construction."[17] We further recognize the principal deputy assistant administrator was announced as the "Acting Assistant Administrator" for Air and Radiation by Administrator Andrew Wheeler on June 26, 2019, following the departure of Assistant Administrator Bill Wehrum.[18] Despite this, the office proponent for the guidance did not sign as "acting" assistant administrator. The Assistant Administrator position requires Presidential appointment and Senate confirmation, and it does not appear from available Senate records that the individual who is principal deputy assistant administrator has been named as a presidential appointee for any position, much less senate confirmed. This raises several questions that EPA must now address, even apart from questions on the substantive legality of the draft guidance.

- Is the Principal Deputy Assistant Administrator acting as the proponent of this guidance under a valid delegation of authority under Clean Air Act section 301(a)?
- Under *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), can it be said that the principal deputy assistant administrator's guidance is "emanat[ing] from those actors, using those vehicles, understood to make authoritative policy in the relevant context"? We believe EPA must acknowledge, as a matter of history and agency office structure, the answer must be no.
- Is the Principal Deputy Assistant Administrator a valid acting officer under 5 U.S.C. § 3345? In the absence of a Presidential appointment for her to be the acting officer, as has historically been the case for predecessors who perform the duty of "acting" assistant administrators, the answer must be no. We believe it is more logical and consistent with agency organizational precedent that a career official in the position of deputy assistant administrator should be the "first assistant to the office" of the Assistant Administrator, and we are not aware of any legal basis by which the Principal Deputy Assistant Administrator, evidently not a "PAS" position and not a career employee position, should hold control as first assistant to the office.
- Is the fact of a Principal Deputy Assistant Administrator acting as proponent of the guidance also a violation of EO 13891 and its OMB implementing memorandum? EO 13891 requires "approval on a non-delegable basis by the agency head or by an agency component head *appointed by the President*, before issuance." As it stands, the draft guidance is plainly styled to reflect only the approval of an official who fails to meet this requirement.

For any one of the above questions to be answered in the negative, or to remain unanswered, would cast serious doubt on the legality of the guidance. Even considering how the EPA Administrator could conceivably invoke some implicit authority to "ratify" an action of an unauthorized official, the Administrator should have to be clear in doing so (i.e., not silently substitute as the signing authority on a draft document that he was not envisioned to sign). Any

[17] "Begin actual construction" is a regulatory term that is "subject to section 7607(d)," and the Administrator may not delegate authority for its revision. See Clean Air Action §§ 301(a)(1), 307(d)(1)(J).

[18] https://www.epa.gov/newsreleases/statement-administrator-andrew-wheeler-regarding-departure-assistant-administrator-bill

such means of corrective recourse may itself undermine the authoritativeness of finalized guidance. Although we see notice-and-comment rulemaking to be mandated for the proposed changes, to whatever extent EPA may insist it is not, it would nevertheless appear the agency must be reconciled to retracting this draft guidance and only reissuing it under the name of a valid agency office proponent. To do otherwise would be contrary to principles of regulatory certainty and predictability and ignore legitimate stakeholder concerns regarding the force and effect of the guidance.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 11, 2020

U.S. Environmental Protection Agency (EPA)
Office of Air Quality Planning and Standards
Air Quality Policy Division

[Submitted electronically via email to draft_permitting_guidance@epa.gov]

Re: Comments on draft guidance for the interpretation of "Begin Actual Construction" under New Source Review (NSR) preconstruction permitting regulations

Dear Mr. Santiago:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to provide comments on the U.S. EPA's draft guidance which adopts a revised interpretation of the term "begin actual construction" in the context of federal major NSR permitting regulations. This guidance was posted for comment on the EPA's NSR website on March 25, 2020. The TCEQ supports the EPA's revised interpretation of the phrase "begin actual construction" consistent with the plain language of the regulatory text.

The EPA's major NSR program is a pre-construction program which requires a source owner or operator to obtain a permit prior to the beginning of construction. Federal NSR regulations at 40 Code of Federal Regulations (CFR) §52.21(a)(2)(iii) provide that "[n]o new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall *begin actual construction* [emphasis added] without a permit that states that the major stationary source or major modification will meet those requirements."

The federal regulations also define the term "begin actual construction" in 40 CFR §52.21(b)(11) as:

> "In general, initiation of physical on-site construction activities ***on an emissions unit*** which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change." [emphasis added]

As noted in the draft guidance, the EPA has historically interpreted the term "begin actual construction" to prohibit almost every physical on-site construction activity of a permanent nature even where the activity does not involve construction "on an

emissions unit." This prohibition extended to installations necessary to accommodate the emissions unit such as laying foundations, installing underground pipes, and building storage structures. However, the EPA has determined that its previous interpretation concerning the meaning of the term "begin actual construction" is inconsistent with the plain language of the regulatory text which provides a distinction between an emissions unit and a major stationary source.

Therefore, the EPA is proposing a revised interpretation under which a source owner or operator may, prior to obtaining an NSR permit, undertake at its own risk physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction *on an emissions unit*, as the term is defined in 40 CFR §52.21(b)(7). This revised interpretation would also allow a source owner or operator to construct building supports, foundations, underground piping, permanent storage units, and engage in other construction activities so long as those activities are not on the actual emissions unit itself.

The TCEQ encourages the EPA’s efforts to improve flexibility for owners or operators seeking to reduce project construction timeframes consistent with the Federal Clean Air Act and the EPA’s regulations. The TCEQ supports the EPA’s revised interpretation that the regulations prohibit construction activities only “on an emission unit” before the issuance of a permit. This interpretation is supported by the plain language of the definition of “begin actual construction,” in 40 CFR §52.21(b)(11) which clearly refers to construction *on an emissions unit*.

The TCEQ also agrees that the EPA’s previous interpretation was unnecessarily restrictive, resulted in delay of some projects, and did not readily accommodate staged construction schedules. Oftentimes, an owner or operator will need to plan the construction or modification of certain emissions units in conjunction with other activities occurring at the site or complete construction within a certain funding window. Allowing a source owner or operator to proceed with all other construction activities other than on the emission unit, itself, such as laying foundation, installing underground utilities and pipes, and constructing storage facilities will ease the ability of an applicant to manage multiple site activities and timely complete projects within funding timeframes.

If you have any questions concerning these comments, please contact Mr. Samuel Short, Director, Air Permits Division, Office of Air, (512) 239-5363, or at samuel.short@tceq.texas.gov.

Sincerely,

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Executive Director

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The Aluminum Association

May 11, 2020

Submitted via draft_permitting_guidance@epa.gov

Anne Isdal
Principal Deputy Assistant Administrator - Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: **Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations**

Dear Anne:

The Aluminum Association (the 'Association') appreciates the opportunity to provide comment on the recent EPA OAR draft guidance memorandum '*Interpretation of Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations*' as provided for public notice and comment on the EPA website on March 25, 2020. The Aluminum Association, based in Arlington, VA, represents US producers and sellers of primary aluminum, aluminum recyclers, producers of fabricated aluminum products, and industry suppliers. Overall, the aluminum industry directly and indirectly contributes nearly 1% of the US GDP. Member companies own and operate over 200 manufacturing facilities located throughout the United States, with multiple companies operating locations subject to the EPA's New Source Review Preconstruction Permitting Regulations. Over the years, understanding and complying with these regulations and their associated interpretations has been a considerable challenge for member companies as they permit new major sources and consider major modifications to existing sources in order to grow their operations and support aluminum's contribution to a strong US economy. Accordingly, the Association's Air Workgroup has a strong interest in the proposed guidance revision, has reviewed it carefully,

supports the proposed revision, and provides the comments below for EPA's consideration in finalizing it.

Regulatory Text of 'Begin Actual Construction' and 'Emissions Unit"

As per 40 CFR 52.21(b)(11), the term 'Begin Actual Construction' is defined as "initiation of physical on-site construction activities on an emissions unit which are of a permanent nature" and as per 40 CFR 52.21(b)(7), the term 'emissions unit' is defined as "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant". Based on an unambiguous reading of the above definitions, EPA's revised guidance is sound and correctly allows on-site activities that do not constitute physical on-site construction on an emissions unit to be conducted prior to the issuance of a final NSR permit.

Prior Association Comments on 'Begin Actual Construction'

In prior comments submitted to EPA in response to the Federal Register notice titled *Evaluation of Existing Regulations* (82 FR 17793, April 13, 2017), the Association noted that EPA needs to:

> "Revise the definition of 'begin actual construction' contained in 40 CFR 52.21 (b)(11) to provide for greater ability for conducting certain construction activities that are of a permanent nature in advance of obtaining a permit. Facilities should, at their own risk, be able to conduct time-consuming construction activities, e.g. installing foundations and running underground utilities, in advance of obtaining a NSR/PSD construction permit where it remains obvious that the source for which a permit is being sought cannot operate. As a reference for how this can work, many states have already incorporated such common-sense allowances in their minor source permitting programs."

Consistent with the comment above from 2017, the Association is supportive of EPA's current efforts to revise the interpretation of 'begin actual construction' to allow site activities that do not constitute physical construction on an emissions unit to be undertaken prior to final NSR permitting.

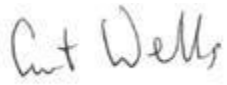
Applicant's Own Risk

The Association and its member companies recognize that under the revised interpretation any construction activities that do not constitute physical construction on an emissions unit

and which commenced prior to final NSR permitting would be undertaken at the applicant's own risk. Consistent with that recognition, EPA's reasoning is sound that the 'applicant's own risk' status is at worst neutral in terms of leverage opportunities in final NSR permitting activities.

As noted above, the Association is pleased to provide these comments to support development of final revised guidance and its subsequent implementation. If you have any questions about these comments and/or the Association can be of further assistance on this topic, please contact me at cwells@aluminum.org or (703) 358-2976. Thanks.

Sincerely,



Curt Wells
Senior Director of Regulatory Affairs
The Aluminum Association

Cc: Juan Santiago, EPA OAQPS

Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902

May 11, 2020

Electronic Submittal
(https://www.draft_permitting_guidance@epa.gov)

Dear Sir or Madam:

RE: TVA COMMENTS ON U.S. ENVIRONMENTAL PROTECTION AGENCY'S DRAFT GUIDANCE—INTERPRETATION OF "BEGIN ACTUAL CONSTRUCTION" UNDER THE NEW SOURCE REVIEW PRECONSTRUCTION PERMITTING REGULATIONS (MARCH 25, 2020)

The Tennessee Valley Authority (TVA) appreciates the opportunity to submit its comments on the U.S. Environmental Protection Agency's (EPA's) Draft Guidance Memorandum titled *Interpretation of "Begin Actual Construction" Under the New Source Review Permitting Regulations* (March 25, 2020). TVA is a non-profit corporate agency of the United States that provides electricity for business customers and local power distributors serving nearly 10 million people in parts of seven southeastern states. TVA receives no taxpayer funding, deriving virtually all of its revenues from sales of electricity. As part of its regional resource development mission, TVA operates the nation's largest public power system. The energy resources that TVA relies upon to serve the public include coal-fired power plants, nuclear plants, combustion turbine plants, hydroelectric dams, renewable energy, and energy efficiency.

Under New Source Review (NSR) regulations, an owner or operator may not begin actual construction on a major source or modification prior to obtaining a preconstruction permit. The term "begin actual construction" is defined in the regulations to mean "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature." 40 CFR § 52.21 (b)(11) (1980). Historically, EPA has interpreted this definition to prohibit all "activities in a permanent way that the source would reasonably undertake only with the intended purpose of constructing the regulated project." Further, EPA has interpreted the term "emissions unit" to "include any installations necessary to accommodate the [emissions] unit." Such an expansive application of the term "emissions unit" in fact erases the distinction between regulatory definitions of an emissions unit and a stationary source. These interpretations, which are overly and unnecessarily restrictive, have had the practical effect of prohibiting almost all on-site physical construction activity that is permanent in nature at a major source prior to obtaining a preconstruction permit, even if those activities are not on an "emissions unit."

In the Draft Guidance, EPA is adopting a revised interpretation of the regulatory term "begin actual construction" that better conforms to the text of the NSR regulations. This revised interpretation gives proper meaning to the term "emissions unit" by focusing on construction activities undertaken on the emissions unit itself rather than prohibiting construction on structures or equipment that merely accommodate the "emissions unit" but do not by themselves emit pollutants or contribute to emissions. Through this revised interpretation, EPA adopts the sensible reading that an "emissions unit" is the "part of the stationary source" that emits. TVA agrees with this interpretation.

TVA has experienced delays in construction schedules while waiting on preconstruction permits to be issued, resulting in millions of dollars in additional, unplanned capital expenditures. These additional expenditures could have been somewhat mitigated if construction activities other than those on the emissions unit (e.g., excavation, pilings, foundations, paving, etc.) could have begun prior to obtaining a preconstruction permit.

TVA understands that any activities undertaken prior to obtaining an NSR permit would be at the permit applicant's own risk because the approval of a preconstruction permit is not guaranteed. But that risk is acceptable in many cases when weighed against prolonged delays in schedule that result in the loss of millions of dollars. And often, work done to prepare for an emissions unit could be repurposed for other uses if an air permit is not granted or is insufficient.

The Draft Guidance allows onsite construction activities to begin, including activities that are costly, may alter the site and are permanent in nature, provided that they do not constitute physical construction on an emissions unit. This approach has the potential to save significant time and resources with no resulting increase in emissions or adverse impact to the environment. As a result, TVA encourages EPA to finalize this guidance.

If you have questions, please contact me at 856-632-4433.

Sincerely,

Rebecca C. Tolene

Rebecca C. Tolene
Vice President
Environment

First Name: Kristin
Last Name: Hart
Organization: Wisconsin Department of Natural Resources Email address: kristin.hart@wisconsin.gov
Comment:
Subject: Comments on Draft Guidance: "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations"

Dear Mr. Wheeler:

The Wisconsin Department of Natural Resources (WDNR) is providing the following comments on the U.S. Environmental Protection Agency's (EPA's) draft guidance document, "Interpretation of 'Begin Actual Construction'
Under the New Source Review (NSR) Preconstruction Permitting Regulations."
In this draft guidance, EPA adopts a revised interpretation of "begin actual construction" as that term is defined and used in the major NSR regulations. Under this revised interpretation, a source owner or operator may, prior to obtaining a major NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – provided that those activities do not constitute physical construction on an emissions unit. This revised interpretation markedly departs from all previous EPA guidance, which had consistently interpreted the regulatory text to prohibit a source owner or operator from undertaking almost any project-related on-site activities of a permanent nature without first obtaining a permit.

1. EPA should pursue its revised interpretation of "begin actual construction" through formal rule making

EPA's revised interpretation appears to contradict the regulatory definition of "begin actual construction" and therefore should be pursued through a formal rule making process revising the regulatory definition. As the draft guidance document itself acknowledges, EPA has consistently interpreted the NSR regulations – both before and after the promulgation of the 1980 rules that introduced the term "begin actual construction" – to prohibit nearly all on-site activities of a permanent nature related to the construction of a new source or the modification of an existing source prior to obtaining a permit. Indeed, the consistency of the Agency's past interpretation is reflected in the fact that the examples of activities prohibited prior to permitting given in the December 1978 Reich memorandum are reproduced almost verbatim in the definition of "begin actual construction" included in the 1980 NSR rules and retained unaltered today in 40 CFR 52.21(b)(11) and 40 CFR 51.165(a)(1)(xv). Several of the proscribed activities explicitly listed in the definition, including "building supports and foundations," "laying underground pipework" and "construction of permanent storage structures," would seem to always be allowed under EPA's revised interpretation, thereby contradicting the existing regulatory text. EPA cannot change the clear language in the current rules through a guidance document; only rulemaking can do that.

2. EPA's revised interpretation will create substantial new burdens on permitting authorities and national inconsistency regarding allowable pre-permitting activities

EPA's revised interpretation will create substantial new burdens on permitting authorities as well as inconsistencies in NSR implementation nationally by moving from what is currently a bright-line test on allowable pre-permitting activities to a case-by-case determination.

Current EPA guidance on on-site activities that are allowed prior to permit issuance, which the draft guidance would overturn, was developed in part to reduce the administrative burden on state permitting authorities and EPA.
Rather than address questions of what pre-permitting activities are allowed on a case-by-case basis, EPA developed a list of certain limited activities allowed in all cases. In contrast, the new interpretation would replace this list of limited activities with an open-ended allowance for a source to undertake activities that may be costly, that may significantly alter the site, and/or are permanent in nature provided these activities are not "on an emissions unit."

3. EPA should provide additional guidance on how to determine the scope of an emissions unit

If EPA elects to adopt its revised interpretation, either through a guidance document or formal rule making, it should provide additional guidance to permitting authorities on how to determine the scope of an emissions unit for the purpose of ascertaining whether actual construction on an emissions unit has begun. EPA's claim that providing detailed guidance on determining the scope of an emissions unit "is beyond the scope of this memorandum" (p.
20) and creates unnecessary confusion for the permittee and permitting authority. The scope of the change regarding when construction begins and the intent to base this new interpretation on the term "an emissions unit,"
obligates EPA to provide detailed guidance on how the scope of an emissions unit is to be determined for this purpose.

4. EPA's revised interpretation will result in a significant regulatory burden on permitting authorities' obligation to address public concerns and identify regulatory issues

Because EPA's revised interpretation would allow a source to undertake significant project-related on-site activities of a permanent nature without obtaining a permit – or even submitting a complete permit application – it will hamper the ability of permitting authorities to address public concerns and identify possible regulatory issues.

Under the current and longstanding interpretation of begin actual construction, an owner, as part of obtaining a permit, must submit a complete permit application prior to undertaking any on-site activities of a permanent nature. A complete application not only identifies the scope of a new major source or major modification, it also includes analyses of environmental and energy impacts due to the proposed construction. In short, the application provides permitting authorities with the information needed to assess probable impacts to ambient air and to identify any oversights by the applicant that could substantially alter proposed designs.

A permitting authority cannot address concerns or issues about which it has no means of speaking meaningfully. Because EPA's revised interpretation removes the obligation of an owner to provide even an application prior to commencing activities of a permanent nature, it increases the regulatory burden on permitting authorities that are obliged to address public concerns about environmental impacts due to on-going construction and to identify regulatory oversights or potential violations in a timely manner.

Thank you for the opportunity to comment on the proposed guidance. Please contact Kristin Hart at (608) 266-6875 or Kristin.Hart@wisconsin.gov if you have any questions regarding these comments.

Sincerely,

/s/ Gail E. Good

Gail Good
Director
Air Management Program
Wisconsin Department of Natural Resources